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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907

No. 5[illegible]

THE ARKANSAS SOUTHERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE GERMANIA NATIONAL BANK.

(20,291.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 326.

THE ARKANSAS SOUTHERN RAILROAD COMPANY AND GEORGE C. GRIFFITH, PLAINTIFFS IN ERROR,

vs.

THE GERMAN NATIONAL BANK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

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1 *Assignment of Errors.*

Assignment and Prayer.

Supreme Court of Arkansas.

No. 5619.

ARKANSAS SOUTHERN RAILROAD COMPANY and GEORGE C. GRIFFITH, Appellants,
vs.
GERMAN NATIONAL BANK, Appellee.

Now come Appellants, Arkansas Southern Railroad Company and Geo. C. Griffith, Surety on the supersedeas bond filed in this case, and file herewith their petition for a writ of error, and say that there are errors in the records and proceedings in the above entitled cause, and for the purpose of having the same reviewed in the United States Supreme Court make the following assignments:—

1. The Supreme Court of Arkansas erred in holding and deciding that Sections 530 and 531 of Kirby's Digest of the Statutes of Arkansas were valid as applied to each of the bills of lading sued upon in this action.

The validity of said sections were denied and drawn in question by the defendant Railroad Company on the ground of their being repugnant to that part of Section 8, Article 1, of the Constitution of the United States vesting in Congress the power "to regulate commerce with foreign nations and among the several States, and with the Indian tribes."

2. The Supreme Court of Arkansas erred in not holding and deciding that Sections 530 and 531 of Kirby's Digest of the Statutes of Arkansas were invalid as applied to each of the bills of lading sued upon in this action representing cotton shipped from Louisiana to Arkansas.

The validity of said sections were denied and drawn in question by the defendant Railroad Company on the ground of
2 their being repugnant to that part of Section 8, Article 1, of the Constitution of the United States vesting in Congress the power "to regulate commerce with foreign nations and among the several States, and with the Indian tribes."

3. The Supreme Court of Arkansas erred in holding and deciding that Sections 530 and 531 of Kirby's Digest of the Statutes of Arkansas were applicable to each of the bills of lading sued upon in this action.

The validity of said sections as applied to each of the bills of lading sued upon in this action were denied and drawn in question by the defendant Railroad Company on the ground of their being repugnant to that part of Section 8, Article 1, of the Constitu-

tion of the United States vesting in Congress the power "to regulate commerce with foreign nations and among the several States, and with the Indian tribes."

4. The Supreme Court of Arkansas erred in holding and deciding that the trial court did not err in giving the instruction requested by the plaintiff Bank in words and figures as follows:—

"The Court instructs the jury that the plaintiff is entitled to a verdict upon each bill of lading sued upon."

for the reason that said instruction is repugnant to that part of Section 8, Article 1, of the Constitution of the United States vesting in Congress the power "to regulate commerce with foreign nations and among the several States, and with the Indian tribes," and the statutes of the United States enacted thereunder.

5. The Supreme Court of Arkansas erred in not holding and deciding that the defendant Railroad Company had complied with its contract by delivering to the Compress the cotton described in each bill of lading representing cotton shipped from Louisiana to Arkansas.

6. The Supreme Court of Arkansas erred in holding and
3 deciding that the defendant Railroad Company did not comply with its contract by delivering to the Compress Company the cotton described in each bill of lading sued upon herein representing cotton shipped from Louisiana to Arkansas.

7. The Supreme Court of Arkansas erred in finding, holding and deciding that the cotton described in the bills of lading representing cotton shipped from Louisiana to Arkansas sued upon herein was

"delivered to the Compress Company for account of Alphin & Lake Cotton Company."

8. The Supreme Court of Arkansas erred in finding, holding and deciding as to shipments from Louisiana to Arkansas that

"In delivering cotton to the Compress Company no other directions were given to it than that contained in this little book. Nothing was said about it in any other way. It was just delivered by that little book, and that was all that passed between the parties. It was always supposed to belong to Alphin & Lake Cotton Co. by the compress and railroad, and was unloaded at once. All the compress did was to count the cotton and O. K. the book as to the number of bales. Neither S. O., meaning shipper's order, nor care of compress company was on this little book. S. O. appears to be upon the book now, but was placed there after the cotton was delivered. It was not on the way bill from which the book was made up.

"The cotton was treated as belonging to Alphin & Lake Cotton Company and was delivered without taking up the bills of lading."

9. The Supreme Court of Arkansas erred in affirming the action of the trial court in directing a verdict against the defendant Railroad Company upon each bill of lading sued upon.

10. The Supreme Court of Arkansas erred in not reversing the judgment of the trial court.

11. The Supreme Court of Arkansas erred in denying each ground of the petition for re-hearing filed by the Appellant.

12. The Supreme Court of Arkansas erred in overruling and denying each of the grounds for a new trial contained in defendant's motion for a new trial filed in the Circuit Court of Union County, Arkansas, to-wit:—

"1. The verdict of the jury is contrary to the law.

4 2. The verdict of the jury is contrary to the evidence.

3. The verdict of the jury is contrary to the law and evidence.

4. The court erred in refusing to give instruction No. 1, as asked by the defendant.

5. The court erred in refusing to give instruction No. 2, as asked by defendant.

6. The court erred in refusing to give instruction No. 3, as asked by defendant.

7. The court erred in refusing to give instruction No. 4, as asked by defendant.

8. The court erred in refusing to give instruction No. 5, as asked by defendant.

9. The court erred in refusing to give instruction No. 6, as asked by defendant.

10. The court erred in refusing to give instruction No. 7, as asked by defendant.

11. The court erred in refusing to give instruction No. 8, as asked by defendant.

12. The court erred in refusing to give instruction No. 9, as asked by defendant.

13. The court erred in refusing to give instruction No. 10, as asked by defendant.

14. The court erred in refusing to give instruction No. 11, as asked by defendant.

15. The court erred in refusing to give instruction No. 12, as asked by defendant.

16. The court erred in refusing to give instruction No. 13, as asked by defendant.

17. The court erred in refusing to give instruction No. 14, as asked by defendant.

18. The court erred in refusing to give instruction No. 15, as asked by defendant.

19. The court erred in refusing to give instruction No. 16, as asked by defendant.

20. The court erred in refusing to give instruction No. 17, as asked by defendant.

21. The court erred in refusing to give instruction No. 18, as asked by defendant.

22. The court erred in refusing to give instruction No. 19, as asked by defendant.

23. The court erred in directing the jury to return a verdict for the plaintiff.

24. The court erred in refusing to allow witness Hutchison to answer the following question: 'How long had the Arkansas Southern Railroad Company been delivering cotton in this way and storing it with or delivering it to the El Dorado Compress Company?

25. Because the court erred in refusing to permit the witness Hutchison to answer the following question: 'Has it been the general usage of the defendant since the time the compress was built here at El Dorado as much as three years ago to store cotton at the compress for the benefit of the holder of the bill of lading?'

26. Because the court erred in refusing to permit the defendant to prove that it had been the usual custom and usage at El Dorado for the past three years for the cotton shipped on the Arkansas Southern Railroad to El Dorado to be delivered to the Compress for the benefit of holders of bills of lading and that the usage was well known at this place.

5 27. Because the court erred in permitting plaintiff to present any proof as to the issuance of bills of lading by the Iron Mountain Railway Company.

28. The court erred in refusing to permit the witness Hutchison to explain what he meant by his statements in a deposition that he supposed that all cotton coming in over the defendant's road and going into the compress went to the account of Alphin & Lake.

29. Because the court refused to permit the defendant to read the letter from Walker to Hutchison set out in the deposition of C. T. Walker."

For which errors the Appellants, Arkansas Southern Railroad Company and Geo. C. Griffith, Surety, pray that the said judgment of the Supreme Court of the State of Arkansas, dated May 7, 1906, be reversed and a judgment rendered in favor of the defendant Company, and for costs.

EDWARD B. PEIRCE,
Attorney for Arkansas Southern Railroad Company et al.

Filed June 9th, 1906.

PEYTON D. ENGLISH, *Clerk.*

6 *Petition for Writ of Error.*

Supreme Court of Arkansas.

No. 5619.

ARKANSAS SOUTHERN RAILROAD COMPANY and GEORGE C. GRIFFITH, Appellants,
vs.
GERMAN NATIONAL BANK, Appellee.

Petition for Writ of Error.

Considering themselves aggrieved by the final decision of the Supreme Court in rendering judgment against them in the above entitled cause, the Appellant, Arkansas Southern Railroad Company, and George C. Griffith, Surety on the supersedeas bond filed in said cause, hereby pray a writ of error from the said decision and judgment to the United States Supreme Court, and an order fixing the amount of a supersedeas bond.

Assignment of errors herewith.

EDWARD B. PEIRCE,
Attorney for Appellants.

STATE OF ARKANSAS, *Supreme Court, ss:*

Let the writ of error issue upon the execution of a bond by the Arkansas Southern Railroad Company and George C. Griffith to the German National Bank in the sum of Fifty thousand ($50,000) Dollars, such bond, when approved, to act as a supersedeas.

Dated June 9th, 1906.

JOSEPH M. HILL,
Chief Justice Supreme Court of Arkansas.

Filed June 9th, 1906.

PEYTON D. ENGLISH, *Clerk.*

7 Copy.

Bond.

ARKANSAS SOUTHERN RAILROAD COMPANY and GEORGE C. GRIFFITH, Plaintiffs in Error,
vs.
GERMAN NATIONAL BANK, Defendant in Error.

Know all men by these presents:

That we, the Arkansas Southern Railroad Company and George C. Griffith, Surety on supersedeas bond filed in Supreme Court of Arkansas, as Principals, and Federal Union Surety Company, as Surety, are held and firmly bound unto the German National Bank

in the sum of Fifty thousand ($50,000) Dollars, to be paid to said German National Bank, to which payment, well and truly to be made, we bind ourselves jointly and severally, firmly by these presents.

Sealed with our seals and dated this 9th day of June, 1906.

Whereas, the above plaintiffs in error seek to prosecute their writ of error to the Supreme Court of the United States to reverse a judgment rendered in the above entitled action by the Supreme Court of the State of Arkansas.

Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute their said writ of error to effect and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void; otherwise, to remain in full force and effect.

ARKANSAS SOUTHERN RAILROAD COMPANY.

[redacted] By E. B. [redacted] *Att'y.* Pierce

GEO. C. GRIFFITH.

[SEAL.] By E. B. [redacted] *His Att'y* Pierce.

FEDERAL UNION SURETY COMPANY.

By M. H. JOHNSON, *Resident Vice Pres.*

Attest:

IDA B. DAVIS.

Bond approved and to operate as a supersedeas.
June 9th, 1906.

JOSEPH M. HILL,
Chief Justice Supreme Court of Arkansas.

Filed June 9th, 1906.

PEYTON D. ENGLISH, *Clerk.*

8 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Arkansas Southern Railroad Company, a corporation, and George C. Griffith, Surety, and the German National Bank, a corporation, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws

of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened, to the great damage of the said Arkansas Southern Railroad Company and George C. Griffith, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things
9 concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 9th day of June, in the year of our Lord one thousand nine hundred and six.

[Seal Circuit Court, Western Division, East. Dist. of ~~Arkansas~~] — Arkansas.

W. P. FEILD,
Clerk Circuit Court United States, Western Division of the Eastern District of Arkansas.
By W. ~~HUSTON~~ FEILD, *D. C.* Presl

Allowed.

JOSEPH M. HILL,
Chief Justice Supreme Court of Arkansas.

Filed June 9th, ~~1906~~. 1906.

PEYTON D. ENGLISH, *Clerk.*

10 *Certificate of Lodgment.*

STATE OF ARKANSAS:

In the Supreme Court.

I, Peyton D. English, clerk of the said court, do hereby certify that there was lodged with me as such Clerk on June 9th, 1906, in the matter of th- Arkansas Southern Railroad Company and George C. Griffith, *versus* German National Bank.

1. The original bond of which a copy is herein set forth.
2. Four copies of the writ of error, as herein set forth—one for each defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this June 9, 1906.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas.

11 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the German National Bank, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Arkansas, wherein the Arkansas Southern Railroad Company and George C. Griffith are plaintiffs in error, and you are defendant in error, to show cause, if any there be why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Arkansas, this 9th day of June, 1906.

JOSEPH M. HILL,
Chief Justice Supreme Court of Arkansas.

Attest:
PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas.

LITTLE ROCK, ARKANSAS, *June 9th*, 1906.

We, attorneys of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

JOHN FLETCHER,
W. C. RATCLIFFE,
Attorneys for the German National Bank.

Filed June 9th, 1906.

PEYTON D. ENGLISH, *Clerk.*

12 *Return to Writ.*

UNITED STATES OF AMERICA:

Supreme Court of Arkansas.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified tran-

script of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Arkansas, in the City of Little Rock, this June 9, 1907.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas.

13 *Caption.*

Pleas Before James S. Steel, Presiding Judge of the Union County Circuit Court in the Case of

No. 721.

GERMAN NATIONAL BANK, Plaintiff,
versus
ARKANSAS SOUTHERN RAILROAD CO., Defendant.

Had at the October Term, 1903.

14 *Index—Original Transcript.*

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15 *Complaint*

In Union Circuit Court

GERMAN NATIONAL BANK, *Plaintiff*,
vs.
ARKANSAS SOUTHERN RAILROAD CO., *Defendant*.

The plaintiff the German National Bank, states—

First. That it is a corporation organized under the laws of the United States and doing a banking business at Little Rock, Arkansas—That the defendant, the Arkansas Southern Railroad Company is a corporation organized and doing business under the laws of Arkansas is a common carrier—That its line of railroad commences at El Dorado, Arkansas, and extends into the State of Louisiana—

Second. That said defendant on the 22nd. day of November 1902 received from the Bank of Bernice at Bernice a station on the said road in Louisiana for shipment over its roads 25 bales of cotton for which it issued a bill of lading, whereby it undertook to deliver said cotton to the order of the said Bank of Bernice at El Dorado, Arkansas.—a copy of which bill of lading is hereto attached marked exhibit "A" and made a part hereof—

Third. That on the 24th. day of November 1902 said defendants received from the Bank of Bernice at Bernice, Louisiana, on its said railroad 72 bales of cotton for shipment over its said road to El Dorado, Arkansas, and issued to said bank a bill of lading therefor whereby it undertook to deliver the said cotton to the order of said Bank of Bernice, at El Dorado, Arkansas—

Fourth. That on the 25th. day of November 1902 said defendant received from the Bank of Bernice at Bernice, Louisiana, on its said railroad 49 bales of cotton for shipment over its said road and issued a bill of lading therefor whereby it undertook to deliver said cotton to the order of said Bank at El Dorado, Arkansas—

Fifth. That on November 26th. 1902 said defendant received from the Bank of Bernice at Bernice, Louisiana on its said road 74 bales of cotton for shipment over its road and issued to said Bank a bill of lading whereby it agreed to deliver said cotton to the order of said Bank at El Dorado, Arkansas—

16 Sixth. That on November 28th. 1902 said defendant received from the Bank of Bernice at Bernice Louisiana, on its said road, 48 bales of cotton to be shipped over its road and issued to said Bank a bill of lading therefor whereby it agreed to deliver said cotton to the order of said Bank at El Dorado, Arkansas—

Seventh. That on the 29th. day of November 1902 said defendant received from the Bank of Bernice at Bernice, Louisiana, on its said road 72 bales of cotton for shipment over its said road and issued to said bank a bill of lading therefor whereby it agreed to deliver said cotton to the order of said Bank at El Dorado, Arkansas—

Eighth. That on December 2 1902 the said defendant received from the Bank of Bernice, at Bernice Louisiana, on its said road, 96 bales of cotton for shipment over its said road and issued to the said bank a bill of lading therefor whereby it agreed to deliver said cotton to the order of said Bank at El Dorado, Arkansas—

Ninth. That on December 3, 1902 the said defendant received from the Bank of Bernice at Bernice, Louisiana, on its said road 122 bales of cotton for shipment over its road and issued to said Bank a bill of lading for the same whereby it agreed to deliver the said cotton to the order of the said Bank at El Dorado, Arkansas—

Tenth. That on the 3rd. day of December 1902 the said defendant received from the Bank of Bernice at Bernice, Louisiana, on its road, 49 bales of cotton for shipment over its said road and issued to said Bank a bill of lading therefor, whereby it agreed to deliver said cotton to the order of said Bank at El Dorado, Arkansas—

Eleventh. That on the 4th. day of December 1902 the said defendant received from the Bank of Bernice at Bernice, Louisiana, on its road 49 bales of cotton for shipment over its road, and issued to the said Bank a bill of lading therefor, whereby it agreed to deliver the said cotton to the order of said Bank at El Dorado, Arkansas—

17 Twelfth. That on the 8th. day of December 1902 the said defendant received from the Bank of Bernice at Bernice, Louisiana, on its road, 26 bales of cotton for shipment over its road and issued to said Bank a bill of lading therefor, whereby it agreed to deliver said cotton to the order of said Bank at El Dorado, Arkansas—

Thirteenth. That the said defendant on the 9th. day of December 1902 received from the Bank of Bernice at Bernice, Louisiana, on its road, 75 bales of cotton, for shipment over its road, and issued to said Bank a bill of lading therefor, whereby it agreed to deliver the said cotton to the order of the said Bank of El Dorado, Arkansas—

Fourteenth. That on the 9th. day of December 1902, the said defendant received from the Bank of Bernice, at Bernice, Louisiana, on its road, 74 bales of cotton for shipment over its road and issued to said Bank a bill of lading therefor, whereby it agreed to deliver the said cotton to the order of the said Bank at El Dorado, Arkansas—

Fifteenth. That on December 10th. 1902, the said defendant received from the Bank of Bernice, at Bernice, Louisiana, on its road, 120 bales of cotton for shipment over its road, and issued to the said Bank a bill of lading therefor, whereby it agreed to deliver the said cotton to the order of said Bank at El Dorado, Arkansas—

Sixteenth. That on December 6th. 1902 the said defendant received from Alphin & Lake Cotton Company at Junction City, Ar-

kansas, on its road, 24 bales of cotton for shipment over its road, and issued to the said company a bill of lading therefor, whereby it agreed to deliver the said cotton to the order of said Company at El Dorado, Arkansas—

Seventeenth. That on the 6th day of December 1902 the said defendant received from the Alphin & Lake Cotton Company at Junction City, Arkansas, on its road, 24 bales of cotton for shipment over its road, and issued a bill of lading therefor to the said Cotton Company, whereby it agreed to deliver the said cotton to the order of said Cotton Company at El Dorado, Arkansas—

18 Eighteenth. Plaintiff says that Exhibit "A" aforesaid is an exact copy of each of said bills of lading except as to dates, place of shipment, consignor, and number of bales shipped. Each of said bills of lading was duly endorsed to plaintiff and plaintiff is now the owner and holder thereof and entitled to the cotton represented thereby. The original of each bill of lading is held subject to the order of Court and inspection of parties—

Nineteenth. Plaintiff further states that on January 19th, 1903 it presented said bills of lading to said defendant at El Dorado, Arkansas, and demanded of it said cotton, and that the defendant refused to deliver said cotton to plaintiff—

That said cotton was worth $40,000, and plaintiff has been damaged to that amount, by the wrongful action of the defendant in failing and refusing to deliver said cotton to plaintiff—

Wherefore plaintiff prays judgment for $40,000 and for other relief.

SMEAD AND POWELL,
RATCLIFFE AND FLETCHER,
Attorneys for Plaintiffs.

Indorsements: No. 721—German National Bank—*vs.* Arkansas Southern railroad Company.—Complaint—Filed and summons issued February 23, 1903. W. J. Pinson, Clerk. Summons issued February 23rd, 1903; and served February 23rd, 1903.

19 *Amended Complaint.*

Union County Court.

GERMAN NATIONAL BANK
vs.
ARKANSAS SOUTHERN RAILROAD CO.

Amendment to Complaint.

The plaintiff by way of amendment and its complaint says: That on December 22, 1902, said defendant received from the Bank of Bernice, at Bernice, a station on the road of said defendant in Louisiana 48 bales of cotton for shipment over its road to El Dorado, Arkansas, for which it issued a bill of lading, whereby

it undertook to deliver said cotton to the order of said Bank of Bernice, at El Dorado, Arkansas, which bill of lading with the exception of date and number of bales and is the same as "Exhibit A" to the original complaint. That said bill of lading has been duly endorsed to plaintiff and plaintiff is now the holder thereof.

Demand has been made on said defendant, and it has failed and refused to deliver said cotton to plaintiff—said cotton is of the value of $2000.00.

Wherefore plaintiff prays judgment for said amount and for all other relief.

SMEAD AND POWELL,
RATCLIFFE & FLETCHER, *For Pl'ff.*

Endorsement: 721—German National Bank—*vs.*—Arkansas Southern Railroad Co. Amendment to Complaint. Filed in open Court Mch. 19 1903. W. J. Pinson Clerk.

20 In the Union County Court.

GERMAN NATIONAL BANK, Plaintiff,
v.
ARKANSAS SOUTHERN RAILROAD COMPANY, Defendant.

Answer.

1. The defendant admits that on the 22nd. of November, 1902, it received 25 bales of cotton at Bernice Station for shipment to El Dorado, for which it issued a bill of lading a copy of which purports to be exhibited with the complaint; but it alleges that in and by the terms of said bill of lading the cotton was consigned to the care of the Compress Company at El Dorado, whereby the defendant undertook to deliver the said cotton to the said Compress Company as agent for the holder of the bill of lading in case such holder did not present the said bill and demand that delivery of the cotton from defendant at the time of its arrival at El Dorado.

2. The defendant admits that on the 24th. day of November 1902, it received 72 bales of cotton at Bernice Station for shipment to El Dorado, and issued therefor a bill of lading; but denies that by said bill of lading it undertook to deliver the cotton to the order of the Bank of Bernice. On the contrary it alleges that no consignee was named in the said bill of lading; but that the cotton was consigned care of the Compress Company at El Dorado, and thereby the defendant was directed and undertook to deliver the said cotton to the said Compress Company at El Dorado for the holder of the said bill of lading in the case such holder did not present said bill and demand the said cotton upon its arrival at El Dorado.

3. It admits that on the 25th of November, 1902, it received 49 bales of cotton at Bernice Station for shipment to El Dorado and issued a bill of lading therefor. Denies that by the said bill

of lading it undertook to deliver the cotton to the Bank of Bernice. On contrary it alleges that no consignee was named in the same bill of lading and that the cotton was consigned care of the Compress Company at El Dorado, and thereby the defendant was directed and undertook to deliver the said cotton to the said
21 Compress Company as agent for the holder of the said bill of lading in case said holder did not present the said bill of lading and demand the said cotton at the time of its arrival at El Dorado.

4. It admits that on the 26th. of November, 1902, it received at Bernice Station for shipment to El Dorado 74 Bales of cotton, for which it issued a bill of lading; but it denies that by the said bill of lading it agreed to deliver said cotton of the Bank of Bernice. On the contrary it alleges that no consignee was named in the said bill of lading; but that the cotton was consigned to the care of the Compress Company, at El Dorado, and thereby the defendant was directed and undertook to deliver the said cotton to the said Compress Company as agent for the holder of the said bill of lading in case the said holder did not present the said bill and demand the said cotton upon its arrival at El Dorado.

5. It admits that on the 28th. of November, 1902, it received at Bernice Station for carriage to El Dorado 48 bales of cotton, for which — its bill of lading; but denies that it thereby agreed to deliver said cotton to the order of the Bank of Bernice. On the contrary it alleges that no consignee was named in said bill of lading; but that the cotton was consigned to the care of the Compress Company at El Dorado, and thereby defendant was directed and undertook to deliver the said cotton to the said Compress Company as agent for the holder of the said bill of lading in case said holder did not present the said bill of lading and demand the said cotton on its arrival at El Dorado.

6. It admits that on the 29th. of November, 1902, it received at Bernice Station for shipment to El Dorado 72 bales of cotton for which it received a bill of lading; but denies that it thereby agreed to deliver said cotton to the order of the Bank of Bernice. On the contrary it alleges that no consignee was named in the said bill of lading; but that the cotton was consigned care of the Compress Company at El Dorado, and thereby the defendant was directed and undertook to deliver the said cotton to the said Compress Company as agent for the holder of the said bill of lading in case the said holder did not present said bill of lading and demand said cotton on its arrival at El Dorado.

7. It admits that on December 2, 1902, it received at Bernice Station for shipment to El Dorado 96 bales of cotton, for which it issued its bill of lading. But denies that it thereby agreed to deliver said cotton to the order of the Bank of Bernice. On
22 contrary it alleges no consignee was named in the said bill of lading, that the cotton was consigned to the care of the Compress Company at El Dorado, and thereby the defendant was directed and undertook to deliver the said cotton to the said Compress Company as agent for the holder of the said bill of lading,

n case said holder did not present the said bill and demand said otton upon its arrival at El Dorado.

8. It admits that on December 3rd, 1903, it received at Bernice Station for shipment, to El Dorado, 122 bales of cotton for which it issued its bill of lading; but denies that it thereby agreed o deliver said cotton to the order of the Bank of Bernice. On he contrary it alleges that no consignee was named in the said ill of lading, but that the cotton was shipped to the care of the Compress Company at El Dorado, and the defendant was thereby directed and undertook to deliver said cotton to the said Compress Company as agent of the holder of the said bill of lading in case said holder did not present the said bill and demand the said cotton n its arrival at El Dorado.

10. It admits that on the 3rd. of December, 1902, it received t Bernice Station, for shipment to El Dorado, 49 bales of cotton, or which it issued its bill of lading, and it alleges that said cotton as consigned to the care of the Compress Company, at El Dorado, nd thereby the defendant was directed and agreed to deliver the aid cotton to the said Compress Company as agent for the holder f the said bill of lading in case said holder did not present said ill and demand the said cotton upon its arrival at El Dorado. den

10. It ~~admits~~ that on the 4th. of December, 1902, it received 9 bales of cotton at Bernice Station for shipment to El Dorado s alleged *all* complaint. It admits that on the said date it issued bill of lading for that amount of cotton purporting to have been eceived for shipment to El Dorado; but it says that no cotton as received by it on said date, and that the bill of lading was nadvertently issued for the consignment of the day before, for hich a bill of lading had already been issued, as is hereinbefore et out.

11. It admits that on December 8, 1902, it received at Bernice Station for shipment to El Dorado 26 bales of cotton, for hich it issued a bill of lading; but denies that it thereby agreed to deliver said cotton to the order of the Bank of Bernice. 3 On the contrary it alleges that no consignee was named in the said bill of lading but that the cotton was consigned o the care of the Compress Company at El Dorado, and the defendant was thereby directed and agreed to deliver said cotton to aid Compress Company as agent for the holder of the said bill f lading in case such holder did not present said bill of lading nd demand said cotton on its arrival at El Dorado.

12. It admits that on the 9th of December, 1902, it received at Bernice Station for shipment to El Dorado 75 bales of cotton, for hich it issued its bill of lading. Denies that it thereby agreed to deliver said cotton to the order of the Bank of Bernice. On contrary t alleges that no consignee was named in the said bill of lading; but hat the cotton was consigned to the care of the Compress Company t El Dorado, and the defendant was thereby directed and agreed to deliver the said cotton to the said Compress Company as agent for he holder of the said bill of lading in case said holder did not pre-

sent the said bill of lading and demand the said cotton upon its arrival at El Dorado.

13. It admits that on the 9th of December, 1902, it received at Bernice Station for shipment to El Dorado 74 bales of cotton for which it issued a bill of lading, but denies that it thereby agreed to deliver the said cotton to the order of the Bank of Bernice, and on the contrary alleges that no consignee was named in the said bill of lading, but that the cotton was consigned to the care of the Compress Company at El Dorado, and the defendant was thereby directed and agreed to deliver the cotton to the said Compress Company as agent for the holder of the said bill of lading in case such holder did not present the said bill of lading and demand the said cotton upon its arrival at El Dorado.

14. It admits that on December 10th, 1902, it received at Bernice Station, for shipment to El Dorado 120 bales of cotton, for which it issued its bill of lading, but denies that it thereby agreed to deliver said cotton to the order of the Bank of Bernice. On the contrary it alleges that no consignee was named in the said bill of lading, but that the cotton was consigned to the care of the Compress Company at El Dorado, and the defendant was thereby directed and agreed to deliver the said cotton to the said Compress Company as agent for the holder of the said bill of lading in case the said holder did not present the said bill of lading and demand the said cotton upon its arrival at El Dorado.

24 15. It admits that on the 6th of December, 1902, it received at Junction City Station, for shipment to El Dorado 24 bales of cotton, for which it issued its bill of lading, but denies that it thereby agreed to deliver the said cotton to the order of the Alphin & Lake Cotton Company. On the contrary it alleges that the said cotton was consigned to the Alphin & Lake Cotton Company care of the Compress Company at El Dorado, and the defendant was thereby directed and agreed to deliver the said cotton to the said Compress Company as agent for the holder of the said bill of lading in case said holder did not present the said bill of lading and demand the said cotton upon its arrival at El Dorado.

16. It admits that on the 6th of December, 1902, it received from the Alphin & Lake Cotton Company at Junction City Station for shipment to El Dorado 24 other bales of cotton for which it issued its bill of lading; but it denies that it thereby agreed to deliver the said cotton to the order of the Alphin & Lake Cotton Company. On the contrary it alleges that the said cotton was consigned to the said Alphin & Lake Cotton Company, care of the Compress Company at El Dorado, and thereby the defendant was directed and agreed to deliver the said cotton to the said Compress Company as agent for the holder of the said bill of lading in case said holder did not present the said bill of lading and demand said cotton upon its arrival at El Dorado.

17. The defendant denies that Exhibit "A," to the complaint is an exact copy of each of the bills of lading except as to dates, place of shipment, consignor or number of bales shipped. On the contrary it alleges that the letters "S. O." signifying "Shipper's Order" were not in the various bills of lading at the time of their execution

and delivery by the defendant, except the bill for 25 bales shipped November 22, 1902, and the bill for 49 bales of cotton shipped December 3rd, 1902, and if such letters appear in the bill held by the plaintiff they were placed there since the execution of said bills and change and alter the contract between the parties. The defendant has no knowledge or information sufficient to form a belief as to whether the bills of lading were duly endorsed to the plaintiff or whether the plaintiff is now the holder or owner thereof or entitled to the cotton represented thereby and therefore denies each of the said allegations.

18. It admits that on the 19th of January, 1903, the plaintiff presented the said bills of lading to the defendant at El Dorado and demand- the cotton and the defendant did not deliver the same. It denies that the cotton was worth $40,000, or that the plaintiff has been damaged to that amount by the action of defendant in failing to deliver it to plaintiff.

19. Further answering the defendant says that under and by the terms of each and every one of the bills of lading issued by it for the shipment of the several lots of cotton set out in the complaint, the cotton was consigned to the care of the Compress Company, at El Dorado, and the defendant was thereby directed by the shipper and agreed to, and with the shipper by terms of said bill of lading to deliver said lot of cotton to the Compress Company as agent for the shipper, or their, or its assigns, in case they did not present their bills of lading and demand said cotton upon its arrival at El Dorado. That in strict accordance with its contract it transported the several shipments of cotton immediately after their receipt from the points of shipment to El Dorado that defendant's road is only about 100 miles in length, and the [redacted] shipments were each and all completed and cotton received at El Dorado its destination, within less than 24 hours after the bills of lading were issued. That none of the holders of the said bills of lading presented the said bills or demanded the said cotton upon the arrival of the said several shipments, or at any other time until January 19, 1903; and the defendant in further compliance with its undertakings as set out in the said bill of lading delivered the said several lots of cotton to the Compress Company, as agent for the said several holders of the bills of lading. That El Dorado was the terminus of defendant's line, and the point of destination of all said cotton, and when the defendant had safely carried it to El Dorado it had performed its full duties as a carrier, except the duty to make delivery in accordance with the bills of lading and that in strict performance of its duties and of the undertakings upon its part as contained in said bill of lading, it delivered the said cotton to the said Compress Company, to be held by it for such holder of said bills. That such carriage and delivery by it had been completed long before the plaintiff presented the bills of lading or demanded the cotton of it, and as defendant is informed, believes, and charges, long before the plaintiff acquired the said bills of lading.

20. The defendant further answering says that it carried and delivered the said several lots of cotton in strict accordance with the terms and provisions of said several bills of lading, and of its under-

takings therein; that the persons holding the bills of lading and owning the cotton at the time when the said several deliveries were made to the Compress Company well knew that the same
26 were being made, consented thereto and acquiesced therein, and that the contracts of this defendant and its duties under the contracts were thereby fully performed, and that after the performance of its said several duties and undertakings under said several contracts, and at a time when the said bills of lading were spent and of no force or effect, the plaintiff acquired the same,—if it has in fact acquired them all. That it acquired them with full knowledge of the terms and conditions thereof, of the defendant's duties in respect thereto and undertakings therein, and of the facts that the cotton had been delivered by the defendant in pursuance of the terms of the said bill of lading, and with the knowledge, consent and acquiescence of the persons holding the said several bills at the time of the respective deliveries. That by the delivery aforsaid the defendant fully performed all its duties and undertakings, and that no right of action accrued to any one against it in respect of the said bills of ladings, but that if it in any way violated its duty or failed to perform its contract by a mis-delivery of the cotton, such misdelivery was made long before plaintiff acquired the bills of lading, and no cause of action accrued to the plaintiff in respect thereof.

ROSE, HEMMINGWAY AND ROSE,
GAUGHAN & SIFFORD, *For Defendant.*

Endorsement: 721—German National Bank *vs.* Arkansas Southern Railroad Co., Answer Filed in open Court March 18 1903, W. J. Pinson, Clerk.

27 In the Union Circuit Court.

GERMAN NATIONAL BANK
v.
ARKANSAS SOUTHERN RAILROAD COMPANY.

Amendment to Answer.

Comes the defendant and by leave of the court files this its amendment to its answer heretofore filed in this cause, and answers as follows:

I.

By way of amendment to paragraph 19 of its original answer it says that by the terms of the several bills of lading issued by it it was expressly stipulated that the liability of the defendant as a common carrier would terminate on the arrival of the cotton at the station or depot of delivery, and that it was understood and agreed that the defendant would be liable as warehouseman; and unless removed by the consignee from the station or depot of delivery within twenty four hours after its said arrival, the cotton might be removed

d stored by the company at the owner's risk and expense in the arehouse of the company, or one of its selection; that consignee s not at the point of consignment either in person or by agents demand said cotton within twenty-four hours, nor for a long time ter its arrival and that in pursuance of the provisions of the said ll of lading cotton was delivered to the said Compress Company; at at the several dates of delivery the Compress Company was a rporation organized under the laws of the State of Arkansas, with e authority to do business in compressing and storing cotton, and pursuance of its authority it was at said several times, and for a ng time previous thereto had been engaged in the business of com-essing and storing cotton at El Dorado, the point of consignment; at it was regarded as a safe and reliable warehouseman, enjoying e general confidence of the people of El Dorado and vicinity, and d a large business in storing cotton. That all said consignments re made to the care of the said Compress Company to the end that e cotton might be delivered to it, to be compressed and stored by and the defendant in pursuance of the terms of consignment and the exercise of all reasonable and proper care and diligence placed e said cotton with the said Compress Company; that it was removed therefrom and shipped out of the country without the fault, knowledge, consent or acquiescence of the defendant and its whereabouts were and are entirely unknown to the fendant long before any *defendant* for the said cotton by the aintiff *of* any other holder of the bills of lading.

II.

Defendant further answering says that on the date of the several ipments of all cotton sued for, all said cotton belonged to the lphin & Lake Cotton Company; that the shipment was made in the ame of the Bank of Bernice, for the *pru*pose of securing to it the yment of small sums of money advanced by it for the purpose of rchasing some of the cotton; that all sums so advanced by it as oresaid were fully paid to it, and their liens discharged before the signment of any of the said bills of lading to the plaintiff. The lphin & Lake Cotton Co. who were the owners as aforesaid of the tton, subject to the said pledge to the Bank of Bernice, knew of, nsented to and acquiesced in the delivery of the said cotton to the ompress Company and thereafter took possession of the said cotton, ld it and received the proceeds, by reason whereof neither the said lphin & Lake Cotton Company, nor any person for, or on its ac-unt, is authorized to claim or demand anything against this de-ndant on account thereof; that — the date of the assignment of the ll- of lading as aforesaid, to the plaintiff, the Bank of Bernice had o interest in the cotton covered by them, as the plaintiff well knew; t the Alphin & Lake Cotton Co. was the sole owner of the said cot-n which had already been delivered, as is hereinbefore set out, to e said Compress Company.

Endorsement: 721. German National Bank *vs.* Arkansas South-n Railroad Co. Filed in open court March 25, 1903. W. J. Pin-on, Clerk.

29 In the Union Circuit Court.

THE GERMAN NATIONAL BANK
v.
THE ARKANSAS SOUTHERN RAILROAD COMPANY.

Amendment to Answer.

Defendant by leave of the court files the following amendment to its answer:

For further defense to each cause of action set out in the complaint the defendant says that at the time of the issue of the several bills of lading neither the consignor, the plaintiff or the plaintiff's assignor had any warehouse for the storage of cotton in El Dorado; that the defendant likewise had no such warehouse, and had never had one, a fact which was of common knowledge in that vicinity, and the consignor and all subsequent parties to the bills of lading well knew the same or were put on notice thereof; that for a long time prior to the issuance of the said bills of lading the El Dorado Compress Company had owned, maintained and operated a public warehouse for the storage of cotton; the company was regarded as a safe and responsible warehouseman, and had the confidence of the public in the performance of its functions as such, ever since the establishment of said warehouse and up to the time of the transactions involved in this cause, it had been the uniform usage of the defendant to deliver to the said Compress Company cotton transported by it to El Dorado and not called for by the holders of the bills of lading within a reasonable time after its receipt at El Dorado, to be held by the said Compress Company for the holders of said bills, and to be delivered by it to such holders upon due presentment thereof; that the existence of this usage at El Dorado was well known, and all the parties to the bills of lading sued on knew or had notice thereof; that because of said usage and in accordance therewith, it was expressly stipulated and agreed in the bills of lading that the defendant's liability as a carrier terminated on the arrival of the cotton at El Dorado, and that unless the cotton was removed within twenty four hours after its arrival it might be stored in a warehouse of defendant or of its selection at the owner's risk
30 and expense; and in view of the said usage the said several bills of lading directed the defendant to deliver the cotton to the said El Dorado Compress Co. to be held by it as agent for the owner and at his risk and expense; and the defendant in accordance with its general usage, and of the provision and directions contained in the said several bills of lading delivered all said cotton to the said Compress Company to be held by it for the respective owners and at their risk and expense; that defendant was no longer responsible therefor, and if it was not delivered to plaintiff upon its demand, the failure so to deliver was due to no fault, omission or misconduct of the defendant.

ROSE, HEMINGWAY & ROSE,
GAUGHAN & SIFFORD,
Att'ys for Def'd't.

Endorsement: 721. German National Bank *v.* Arkansas Southern Railroad Co. Amendment to answer. Filed in open Court Oct. 8, 1903, W. J. Pinson, Clerk.

31 *Court Ordered Filing Complaint & Answer.*

STATE OF ARKANSAS, *County of Union, ss:*

Be it remembered, That at a term of the Union County Circuit Court, begun and held at El Dorado, the county site of said County, on the Third Monday in March, A. D. 1903, present C. W. Smith Judge presiding W. J. Pinson Clerk of said Court, W. G. Pendleton the Sheriff of Union County among others the following proceedings were had in said court, at said term, to wit:

Third Day, Wednesday, March 18, 1903.

Court was proclaimed duly open pursuant to adjournment. Present and presiding the Hon. C. W. Smith Judge of the 13th, Judicial Circuit.

721.

GERMAN NATIONAL BANK
vs.
ARKANSAS SOUTHERN R. R. Co.

Complaint—Ans. Def't Filed.

Comes the defendant and on motion files in open Court its answer to the complaint of the plaintiff.

4th Day, Thursday, March 19th, 1903.

Court was proclaimed duly open pursuant to adjournment. Present and presiding the Hon. C. W. Smith Judge of the 13th Judicial Circuit.

721.

GERMAN NATIONAL BANK
vs.
ARKANSAS SOUTHERN RAILROAD CO.

Amendment to the Complaint Filed.

Comes the plaintiff the German National Bank by their Attorney John Fletcher and on motion file in open court an Amendment to its complaint in this matter.

Ninth Day, Wednesday, March 25th, 1903.

Court was proclaimed duly open pursuant to adjournment. Present and presiding the Hon. Judge of the 13th. Judicial Circuit.

721.

GERMAN NATIONAL BANK
vs.
ARKANSAS SOUTHERN RAILWAY.

Complaint—Amendment to Answer Filed.

32 Comes the parties by their Att'ys. On motion the defendant filed their amendment to the answer in this cause.

STATE OF ARKANSAS, *County of Union, ss:*

Be it remembered, That at a term of the Union County Circuit Court, begun and held at El Dorado, the county site of said County, on the First Monday in October A. D. 1903, present James S. Steele Judge presiding W. J. Pinson Clerk of said Court, W. G. Pendleton the sheriff of Union County among others the following proceedings were had in said court at said term to wit:

Fourth Day, Thursday, October 8th, 1903.

Court was proclaimed duly open pursuant to adjournment. Present and presiding the Hon. James S. Steel, Judge.

721.

GERMAN NATIONAL BANK
vs.
ARKANSAS SOUTHERN RAILROAD CO.

Amendment to Ans. Filed.

Comes the plaintiff by their attorneys and on motion the defendant by attorney, filed in open court an amendment to its answer heretofore filed in the cause.

Fifth Day, Friday, Oct. 9, 1903.

Court was proclaimed duly open pursuant to adjournment. Presnt and presiding Hon. James S. Steel Judge.

33 721.

GERMAN NATIONAL BANK
vs.
ARKANSAS SOUTHERN RAILROAD CO.

Jury Trial.

On this day this cause being called for trial the plaintiff appeared by its attorneys [redacted] Fletcher, W. B. Smith and H. P. Smead and

the defendant by its attorneys, W. E. Hemingway and Gaughan & Sifford and this cause being ready for trial it is so announced by both plaintiff and defendant and a struck jury is ordered herein and after being made is as follows, to wit:—

1. S. G. Hanry,	5. J. H. Nelson,	9. F. W. Miles,
2. J. F. Marrable,	6. W. J. Miles,	10. J. A. Hinson,
3. J. T. Murphy,	7. G. G. Kinard,	11. J. C. Swilley,
4. P. A. Goza,	8. T. E. Adams,	12. C. A. Storms,

twelve good and lawful men of Union County Arkansas, who are duly and regularly selected, empanelled and sworn to try this case and after hearing a portion of the evidence as detailed by sworn witnesses, and there not being sufficient time, on this day to complete the trial of this cause, the Jury are respited over under the instructions of the Court and premitted to disperse until tomorrow morning at 8:30 o'clock.

Sixth Day, Saturday, October 10th, 1903.

Court was proclaimed duly open pursuant to adjournment. Present and presiding the Hon. James S. Steele, Judge.

721.

GERMAN NATIONAL BANK
vs.
ARKANSAS SOUTHERN RAILROAD CO.

Comes the plaintiff by its attorneys [redacted] Fletcher, H. P. Smead and W. B. Smith, and comes the defendants by Gaughan & Sifford and W. E. Hemingway its attorneys and comes also the petit Jury in this case and after hearing the balance of the evidence in the case as detailed by the witnesses sworn herein and there not being time further to proceed with the trial of same on this day, the said Jury are respited over and permitted to disperse under the instructions of the Court until Monday October 12 1903 at 9 o'clock A. M.

Seventh Day, Monday, October 12th, 1903.

Court was proclaimed duly open pursuant to adjournment. Present and presiding the Hon. James S. Steele, Judge.

34 *Judgment.*

721.

GERMAN NATIONAL BANK
vs.
ARKANSAS SOUTHERN RAILROAD CO.

Comes the plaintiff, by its attorneys, [redacted] Fletcher, H. P. Smead, and W. B. Smith, and comes the defendant by Gaughan &

Sifford, and W. E. Hemingway its attorneys, and comes also the petit jury in this case, and after receiving the instructions given by the court, the said jury returns, from the jury box, by agreement of counsel, the following verdict, to wit:

"We the jury find for the plaintiff, in the sum of $39,025.10."

J. F. MARABLE, *Foreman.*

It is therefore considered, ordered and adjudged by the court that the plaintiff, German National Bank—a corporation duly organized under the laws of Arkansas and doing business at Little Rock, Arkansas—do have and recover of and from the defendant, Arkansas Southern Railroad Company—a corporation organized under the laws of Arkansas and Louisiana—the sum of Thirty nine thousand twenty five and 10/100, Dollars, for its debt and interest to this date, with (6%) six per cent. interest thereon from this date until paid, and all costs expended in and about this cause.

35 *Motion for New Trial.*

721.

GERMAN NATIONAL BANK
vs.
ARKANSAS SOUTHERN RAILROAD CO.

Motion for New Trial Filed and Overruled and 90 Days Granted to File "Bill of Exceptions."

Comes the plaintiff and the defendant in this case by their attorneys and the defendant files in open court his motion for a new trial of this case which coming on for a hearing is submitted to the Court and by the said Court overruled. It is therefore considered ordered and adjudged by the Court that said motion for a new trial of this cause be and the same is hereby overruled and that the plaintiff do recover of the said defendant Railroad Company all costs expended.. To which ruling, judgment and opinion of the court in overruling said motion, the defendant excepts and his exceptions are here noted of record and the said defendant, Arkansas Southern Railroad Company is given ninety days (90) from this date in which to prepare and file a bill of exceptions herein.

Filing of Bill of Exceptions.

The bill of exceptions in this case was filed in the office of the Clerk of the Circuit Court, on the 26th day of December, 1903, at 5:45 o'clock, P. M.

(Signed) W. J. PINSON,
Circuit Clerk.

36 In the Union Circuit Court.

GERMAN NATIONAL BANK, Plaintiff,
vs.
ARKANSAS SOUTHERN RAILROAD CO., Defendant.

Bill of Exceptions.

Be it remembered that on Friday the 9th. day of October, 1903, the same being a day of the regular October term of this court, this cause came on to be tried, and a jury being duly empaneled, the following proceedings were had, to wit:

Testimony of Oscar Davis.

OSCAR DAVIS, a witness for the plaintiff, being duly sworn testified:

Q. You are the Cashier of the German National Bank?
A. Yes sir.
Q. How long have you been Cashier of that Bank?
A. Between fourteen and fifteen years.
Q. Are you familiar with the transactions by which the bank acquired the bills of lading in controversy in this case?
A. I am.
Q. I show you the bills of lading sued on in this case, state whether or not you acquired, at the time set forth in the complaint these bills of lading?
A. These are the same.

All the Bills of Lading sued on are here offered in evidence by the plaintiff and read to the jury, being in number the same as identified in the complaint.

A copy of Bill of Lading No. 119 dated November 22 1902 for 25 bales of cotton is set out in full in this bill of exceptions at the close of the testimony of Oscar Davis. All the other bills of lading issued at Bernice are exactly the same except as to the dates, numbers and descriptions of the bales of cotton—and of the cars in which they were shipped; the two bills issued at Junction City are also exactly like the one copied except as above stated, and except that by them the consignment is as follows:—"S. O. Alphin & Lake Cotton Co. C/ El Dorado Compress Co., El Dorado, Ark." and upon the backs is endorsed "Alphin & Lake Cotton Co. per E. H. Lake."

37 The copy set out shows the contents of the others so far as pertinent or material to the issues in this cause.

Q. Just state the circumstances under which the Bank acquired these bills of lading?
A. It acquired them as security for a loan made the Alphin & Lake Cotton Co.
Q. How much of a loan?

A. I think the aggregate is $37,056.00.

38 Q. Was the money actually advanced?

A. Yes sir, in cash and its equivalent, all cash but ten thousand dollars.

Q. Did you take a note for the loans?

A. I did not for the first loan of $17,856.00 is my recollection of it, it was a temporary loan on the 6th. of December. Mr. Lake applied to me for the money claiming that the delays in procuring cars for shipment had necessitated his borrowing more money from his two banks than they were able to continue, and asked me if we had any money we cared to loan and I told him we did on proper security, and I told him [redacted] wanted either shipper's order bills of lading or Little Rock Compress receipts on the basis of fifty dollars a bale. He showed me that the cotton was worth from $42.00 to $47.00 per bale and I advanced him $32.00 per bale and my recollection is the date of the application was the 6th. of December, and he said there was a draft on him at the Bank of Little Rock and he had to take it up that day, and I consented to make the loan and the Bank of Little Rock received his check on us for that amount with bills of lading attached and we paid the check and at the clearing on Monday morning the Board certified it as on Saturday.

Q. What bills of lading were attached to that check, for how much cotton?

A. My recollection is [redacted] it was 556 bales; 558 bales it was.

Q. Can you state what bills of lading accompanied that check?

A. I think I can, I kept them separate, the two loans, the second was kept separate until I came down here in January and I left two bills of lading with some of the officers of the Railway Company for their personal investigation and they were subsequently returned to me and in the meantime the bills of lading were turned

39 over to the attorneys, and were as follows:

But I believe the following eight were received on December 6: the date the first loan was made to wit: Bill of Lading Nov. 22nd for 25 bales; Nov. 24th. 72 bales; Nov. 26th. 74 bales; Nov. 25th. 49 bales; Nov. 26th. 74 bales; November 28th, 48 bales; Nov. 29th, 72 bales; Dec. 2 96 bales; Dec. 3rd, 122 bales.

40 Q. Making a total of what?

A. 558 bales. And then on the 11th. day of December Mr. Lake called again stating that conditions were really worse and that he had about three thousand bales stored here and that they could not procure car service and had to buy to fill orders and asked me if I would let him have more money and I told him yes, all he wanted on that character of security and we let him have that day $19,200.00 on bills of lading of 441 bales, and one draft he claimed that had a bill of lading attached had not been received by the Bank but had been drawn on him, and he would substitute El Dorado Compress receipts and deliver them when they arrived and I accepted them and took bills of lading for 441 bales and 158 bales in Compress receipts, and I took his note for that loan and specified these securities in the collateral note, and at the same time he says less the 158 bales you have sufficient on the other loan to secure this.

The defendant objected to so much of the foregoing answer that there was any verbal agreement at the time of making the second loan that the collaterals given for the first loan should be held as security for the second also. The court overruled the objection. The defendant excepted, and the examination of the witness continued.

Q. State what understanding there was at the time you made the second loan as to the collateral which had accompanied the first loan?

41 A. The understanding was that the original collateral should also be collateral for the second loan; Mr. Lake made the remark that cotton had advanced and we had sufficient anyway.

Q. What was the price of cotton at that time?

A. From 7½ to 8 cents per pound. We regarded the cotton market in this locality as worth about 7¾ cents per pound; we let him have $32.00 per bale with $5.00 per bale margin, making about $37.00 per bale.

Q. That was the estimated value of cotton per bale?

A. Yes sir.

Defendant objects to this testimony if it is in any way intended to show what this cotton was worth, and the court says it is allowed to show the basis of the loan.

Q. At the time the second loan was made did he show the bills of lading to you?

A. Yes sir they were delivered.

Q. In what way did you pay that?

A. The amount of money as I was informed, and the purpose for which it was requested was to take up a draft in the Bank of Little Rock for $19,200.00, and the bills of lading and compress receipts were delivered to me by Mr. Perry and Mr. Lake and I advanced the $19,200.00, and Mr. Perry said Mr. Walker, Cashier of the Bank of Little Rock, requested them to procure from us New York Draft for $10,000.00, and I gave it for that and $9,200.00 in cash.

Q. Was anything said as to where the money you paid Lake at that time was to go?

Objected to by defense, objection overruled by the Court and defense excepts.

A. For the purpose of taking up a draft of the Bank of Bernice at the Bank of Little Rock and the draft and money was taken to the Bank of Little Rock and turned over to them.

Q. What bills of lading were delivered to you on the last loan?

42 A. A bill of lading dated 12/3 for 49 bales. One dated 12/9/02 for 75 bales. One dated 12/9/02 for 74 bales. One dated 12/10/02 for 120 bales. One dated 12/6/02 for 24 bales. One dated 12/6/02 for 24 bales Making a total of 441 bales, covered by shipper's Order Bill of Lading and 158 Compress receipts.

Q. They are the bills on which this suit is brought?

A. Yes, sir, part of it.

Cross-examination:

Q. I understood you to say this morning when you made the first loan you paid a check that was drawn by Lake on your bank to which was attached bills of lading that came with a draft to the Bank of Little Rock; am I right in that or not?

A. I do not know whether I stated that, I said I paid his check for $17,856 in favor of the Bank of Little Rock with bills of lading attached to the extent of 558 bales, I do not think I stated there was any draft in connection with the loan, the loan was made for the purpose of taking up a draft as I understood it.

Q. You do not know where these bills of lading came from of your own knowledge?

A. They came from the Bank of Little Rock.

Q. How do you know that?

A. They came from there attached to his check.

Q. Do you know of your own knowledge where those bills of lading came from?

A. I had better explain how I know that.

Q. Tell me if you know they came from the Bank of Little Rock and were attached to drafts that were then in the Bank of Little Rock?

A. Yes sir. They were attached to the check of the Alphin Lake Cotton Company in favor of the Bank of Little Rock presented to us for O. K. at the time the check was presented.

Q. That is not the matter I am asking about do you know those bills of lading were ever attached to a draft which was in the
43 Bank of Little Rock?

A. I have no knowledge of that.

Q. You do not know where they came from except you say some of them bore the endorsement of the Bank of Little Rock?

A. I know they came from there to us.

Q. Where they got them you know nothing about?

A. No sir.

Q. Where is the note given for the second loan?

A. I have it in my hand sir.

Q. Just read it to the jury, the description?

A. It is dated December 11th. 1902, for $19,200.00, interest from date, collateral stipulated is for bills of lading and compress receipts attached, bills of lading for 441 bales and compress receipts for 158 bales, payable on demand.

Q. If the bills of lading deposited as collateral for the first loan were intended to be collateral for this loan why did you not put them in the note?

A. I do not know why.

Q. You seem to have intended to describe the collateral you were taking for this loan?

A. The loan was made just about three o'clock, about the closing hour of the Bank, when every one connected with the Bank was extremely busy and in a hurry and it was necessary to prevent that note from being protested after three o'clock and I hurriedly wrote the note as I counted the collateral and stated it in there and he signed it.

Q. It would not have taken long to have described the collateral with the first note?

A. Not much longer. I suppose if I had seen it would be questioned I should certainly have put it in there.

Q. You did not expect there would be any question about the collateral that was described?

44 A. I had no idea of it at all, or I would not have made the loan of course.

Q. What rate of interest does that note bear?

A. 10% from date.

Q. There was no discount mentioned?

A. No sir.

Q. The first loan is simply a loan on open account?

A. Over-draft, yes sir.

Q. You got no note of any sort, or any written obligation to pay the amount of that loan?

A. No sir.

Redirect examination:

Q. Is it anything unusual in Banks in taking a second note to have an agreement that prior security should apply to it?

A. No indeed, it is very frequently done.

Q. Is it anything unusual to not mention that fact in the notes which you take on the second loan?

A. We always consider any collateral in the hands of the Bank as good for any amounts owing to the Bank, either as makers or endorsers while we have that collateral.

45 *Cotton Bill of Lading.*

Arkansas Southern Railroad Company.

"Domestic." No. 119.

BERNICE STATION, LOUISIANA DIVISION, *Nov.* 22, 1902.

Received from Bank of Bernice 25 bales of cotton in apparent good order, marked and numbered as below, to be transported from Bernice La. to El Dorado, Ark. and delivered to the consignees or a connecting common carrier.

The cotton aforesaid may pass through the custody of several carriers before reaching its destination, and it is understood as part of the consideration for which the said cotton is received, that the exceptions from liability made by such carriers respectively shall operate in the carriage by them respectively of the said cotton, as though herein inserted at length, and especially that neither of said carriers or this Company shall be liable for loss or damage of any kind, occasioned by delays from any cause, or by change of weather, or for loss or damage by fire, or for loss or damage on seas, lakes canals or rivers. And it is further especially understood, that for all loss or damage occurring in the transit of the said cotton the legal remedy

shall be against the particular carrier only in whose custody the said cotton may actually be at the time of the happening thereof, it being understood that Arkansas Southern Railroad Co. in receiving the said cotton to be forwarded as aforesaid, assumes no other responsibility for its safety or safe carriage than may be incurred on its own road. All cotton will be subject to necessary baling, and is received at owner's risk of wet and dirt, and carriers will not be accountable for loss in weight arising from unavoidable causes. Freight to be paid on the actual gross weight as ascertained by the Company's scales. Claims for damage must be reported by the consignee in writing to the delivering line within thirty-six hours after the consignee has been notified of the arrival of the freight at the place of delivery; if such notice of claim for damage is not thus given, neither this company nor any of the connecting or intermediate carriers shall be liable. In the event of the loss of property under the provisions of this agreement, the value or cost of
46 the same at the point of shipment shall govern the settlement.

The carriers reserve to themselves the privilege of compressing all cotton signed for on this bill of lading.

No liability will be assumed for wrong carriage or wrong delivery of Cotton that is imperfectly marked.

Notice.—This contract is accomplished, and the liability of the companies as common carirers thereunder terminates on the arrival of the cotton at the station or depot of delivery, and it is understood and agreed that the companies will be liable as warehousemen only thereafter; and, unless removed by the consignee from the station or depot of delivery within twenty four hours after its said arival, the cotton may be removed and stored by the Company at owner's risk and expense in the warehouse of the company or one of its selection; and after remaining in such warehouse sixty days, the carrier at point of destination may, at its election, advertise in one or more newspapers published in that county for not less than ten days, and sell the cotton either at that point or at such point on its line as it may select, and out of proceeds of such sale pay all charges.

In accepting this contract, the shipper, or other agent of the owner of the Cotton carried, expressly accepts and agrees to all its stipulations and conditions.

In making this contract, the shipper or other agent of the owner of the Cotton named herein, expressly acknowledges that he has had the option of making the shipment under the tariff rates, either at carrier's risk or upon a limited liability, and that he has selected the rate and liability named herein, and he expressly accepts and agrees to all the stipulations and conditions herein named.

This bill of lading limits the carrier's liability on account of reduced rates and other considerations.

Rates guaranteed
To ——
— cts. Per Bale
— cts. per 100 Lbs.
Charges adv. $—

Consigned to S/O.
Notify [redacted] c/o [redacted] Compress
El Dorado, Ark.
Alphin & Lake Cotton Co.

47

Number of bales.	Marks.	Tag numbers.	Weight, subject to correction.
25	A. L.	4263—4216—2772—4256—4247 ..	
		4091—4243—4206—4245	
	241	4244—4217—4240—4219	
		4246—4089—4218—4336	
		4093—4338—4332—4116	
		4329—3875—3964—3963	

H. W. ANDERSON, *Agt.*

[Endorsed:] Bank of Bernice, Bernice, La.

48 *Testimony of C. D. Govan.*

C. D. GOVAN, a witness for the plaintiff being duly sworn testified:

Q. Where do you live?
A. In Eldorado.
Q. Where did you live last December?
A. I bought cotton at Junction City.
for Q. [redacted] whom?
A. The Alphin-Lake Cotton Co.
Q. Did you keep a record of the cotton you bought at that time?
A. Yes sir.
Q. Did that record show the weights of the cotton and the prices and date of purchase?
A. Yes sir.
Q. I show you two bills of lading dated December 6th, 1902 at Junction City, Arkansas for 24 bales of cotton each, you have seen them before have you not?
A. Yes sir.
Q. Have you examined your books to see whether or not they contain a record of the dates and bales there?
A. Yes sir.
Q. Do you find the weights and dates and prices there as described on your books?
A. Yes sir.

Q. Have you made a list of it from your books?
A. Yes sir.
Q. State whether or not that is the list?
A. Yes sir.
Q. State whether or not the list you hold there shows correctly the weights and prices and the date of the purchase of the cotton?
A. Yes sir.
Q. You have made out that and compared it with your books and the bills of lading?

49 A. Yes sir.

Q. And you state to the jury it is a correct list of all the cotton on these two bills of lading showing the weights, date of purchase and the number of each bale and price as shown by the bills of lading?
A. Yes sir.

It is here stipulated by counsel of the respective parties that the amount paid for the cotton covered by the bills of lading sued on at the points of shipment is $37,455.29 an average of $37.49 per bale.

50 Deposition of J. D. Green filed in this cause March 30, 1903 is here introduced in evidence and read to the jury so much of which as is material to this controversy is as follows, to wit:

Testimony of J. D. Green.

Examination in chief:

J. D. GREEN, a witness for the plaintiff being duly sworn, deposes as follows:

Q. State your name?
A. J. D. Green.
Q. Where do you live?
A. At Bernice, La.
Q. What is your occupation?
A. Cotton buyer.
Q. How long have you been engaged in the business of cotton buyer?
A. Five years.
Q. At Bernice?
A. No sir.
Q. How long at Bernice?
A. I have been in Bernice two years or a little longer, but not here all the time.
Q. Did you buy for Alphin-Lake Cotton Co. last season?
A. Yes sir.
Q. Were you engaged in cotton buying in the months of October, November, December and January?
A. Yes sir.
Q. In shipping, as I understand it, you would get a list of the cotton you wanted shipped out?
A. I would give Covington a list of it and he would make a copy of it on his yard book and ship it out.

Q. Take this first bill of lading dated November 22nd, 1902 25 bales, you would take to him the yard numbers for 25 bales?

A. I would take the yard numbers for what amount I had on hand. If I bought ten bales of cotton I would give him the yard numbers in the morning so he could keep up with the cars

51 and see how many bales he had to ship out.

Q. As fast as you would get the cars you would ship it out?

A. As soon as I bought the cotton I gave him the yard numbers and he shipped it as soon as he could get the cars in which to ship it.

Q. You would buy the cotton and it would go into the yards?

A. It was already on the yard.

Q. But when you bought cotton from the wagons it would go into the yards?

A. Yes sir.

Q. And if you bought from the merchants here it would already be there?

A. Yes sir.

Q. And you would buy from the merchants according to the check numbers?

A. Yes sir. And I would give Covington a list of the numbers I bought in his yard and he would ship it out as fast as he could get the cars.

Q. You had nothing to do then with the shipping?

A. I asked for the cars.

Q. He made out the bills of lading and saw it was loaded and the bills of lading would go forward?

A. Yes sir, or turned into the Bank here.

Q. Did the Bank of Bernice pay for your cotton as you would buy it?

A. Yes sir for quite a while.

Q. You would pay them back how?

A. Deposit the bills of lading in the Bank and draw against the bills of lading.

Q. In other words, you drew a draft with the bill of lading attached?

A. The Bank would do that.

Q. How were the bills of lading made out?

A. In the name of the bank.

52 Q. Covington would make them out in the name of the Bank as a rule?

A. Yes sir.

Q. All that cotton shipped out with bills of lading in the name of the bank was bought by you for the Alphin-Lake Cotton Co.?

A. Yes sir. But there was some cotton bought that was shipped out, if I remember, and the drafts were not paid, and we made the bills of lading through the bank here and forwarded them to Little Rock as collateral.

53 Cross-examination:

Q. When were the bills of lading issued with reference to shipment from here?

A. After the cotton was loaded.

Q. How long after it was loaded before it went forward?

A. They got it out as soon as they could.

Q. How long a delay was there?

A. I do not suppose more than a day or so.

Q. From the time the bill of lading was issued until the time the cotton was delivered in El Dorado there was never more than one or two days' interval was there?

A. I would not swear that.

Q. It left here within a day after it was loaded?

A. I never noticed that but as a general thing they pulled it right out. Some of the cotton may have stood on the track and me not have known it.

Q. Who attended to the billing?

A. Mr. Covington.

Q. Who gave him directions as to how to bill it?

A. I did on some.

Q. The cotton was billed as received from the Bank of Bernice, and no consignee's name was written in the bills, the bills showed "Notify Alphin & Lake Cotton Co., care Compress, El Dorado," who directed that the bills be made that way?

A. I do not know that I could say, that is the way I always shipped it.

Q. Who did direct it done, somebody directed it done that way?

A. After we commenced buying cotton and the Bank commenced paying for it, as well as I remember Mr. Alphin called me up and told me to have the bills made that way.

Q. What became of the cotton after it left here, do you know?

A. No sir, I was through with it then and had nothing more to do with it.

54 Q. You say these bills of lading were attached to drafts for the purpose of supplying the Bank with money it advanced to pay for the cotton—who drew those drafts?

A. I deposited the bills of lading at the Bank and the Bank would draw them.

Q. On whom were those drafts?

A. I think on Alphin & Lake. I suppose they were, they are the parties who got the cotton.

Q. Do you know when the drafts were sent?

A. No sir, not all of them; in fact I do not know when any of them were sent except in a general way.

NOTE.—The depositions of J. D. Green were taken at Bernice, La. on the 20th. and 21st. days of March 1903; by consent before J. E. Ferguson Justice of the peace.

55 *Testimony of Oscar Davis.*

OSCAR DAVIS, a witness for the plaintiff, recalled for further cross-examination by the defense testified:

Q. Mr. Davis when did you first make any demand for this cotton?

A. I think on the 19th. day of January.

Q. Had you made any inquiry about the cotton up to that time?

A. I had not.

Q. Did you have any representative here to make any investigation about the matter at all?

A. None.

Objected to by plaintiff as having nothing to do with the case and not proper cross examination and the Court overrules the objection, to which ruling of the court plaintiff excepts.

Q. You say you made demand on the 19th. day of January, do you mean the 19th. day of January 1903?

A. Yes sir.

Plaintiff here asks that the last two questions and answers thereto be excluded from the jury, which the court refuses to do and to which ruling of the court plaintiff excepts.

Redirect examination:

Q. Mr. Davis was there any reason why you should make demand for this cotton before you did?

Objected to by the defense because it is immaterial and objection overruled by the court and defense excepts.

A. There was no occasion for making any demand that we knew of.

Q. Was it anything unusual for Banks to hold bills of lading that long without making demand?

Objected to by defense because the custom which pre-
56 vails at Little Rock can shed no light on the custom which prevails in El Dorado, and the Court says custom is not going to settle this case, it is going to be settled by law and he does not care what the custom is, to which ruling the plaintiff excepts.

Q. What is the custom of banks that acquire Shipper's Order bills of lading in making demand upon the railroads for that cotton in the State of Arkansas?

Objected to by defendant, objection sustained by the Court and plaintiff excepts.

Q. Mr. Davis is there a custom of dealing established between Banks that acquire Shipper's Order bills of lading for cotton, and the owner of the equity in the cotton, that is the person who pleads

it, as to the notice that is given the Bank of the arrival of the cotton at the place of destination ?

Objected to by defendant, objection sustained by the Court and plaintiff excepts.

Q. Mr. Davis what is the custom among the bankers of Arkansas, if you know, in reference to making demands of any of the railroads for cotton, the bills of lading for which the Banks hold?

Objected to by defendant, objection sustained by the Court and plaintiff excepts.

Q. State whether or not the banks take bills of lading to any large extent as collateral security to loans made?

Objected to by defense, objection sustained by the court and plaintiff excepts.

Q. Mr. Davis, do you know what was the usual time in accordance with your experience at the Bank in taking bills of lading as collateral security of delivery by the Railroad Company, that is, delivery of the cotton, after the bill of lading is issued, at the point of destination, and is there any delay during the months of November and December after the cotton is marketed?

Objected to by defendant, objection sustained by the Court and plaintiff excepts.

Plaintiff here closed.

57 The deposition of C. T. WALKER taken on part of defendant is here introduced by the defense and read to the jury as follows:

Deposition of C. T. Walker.

C. T. WALKER being recalled, deposes and says:

Q. In your deposition taken a few days ago, you stated, in reference to the letter of December 8th that it enclosed a draft for $2801.-69. You stated at another place that the item in their letter of the 2nd., was credited on the 9th day of December, which is the $2801.-69 item, as shown upon the book. You also stated that this $2801.69 was enclosed in the letter of the 2nd. State whether or not these relate to one and the same item.

A. It came to us in their letter of the 2nd and was returned and came back with the bill of lading in their letter of the 8th., and was paid on December 9th.

Q. In the letter of December 6th there was enclosed three drafts on the Alphin & Lake Cotton Co. as follows $2753.85, $3225.71 and $907.64. When do those drafts appear to have been paid?

A. Evidently after banking hours on the 11th of December. They were passed to their credit upon our books on the 12th.

Q. State whether or not the bills of lading for cotton shipped by Alphin & Lake at Junction City, Ark. were sent through the Bank of Little Rock.

A. I think most of it was. I don't know of anything to the contrary the past season. The season before, it used to go occasionally to the Bank of Commerce.

Q. Can you state that all of them passed through your bank?

A. I could not.

Q. What was the rule as you understood it in reference to those? (Objected to as calling for an answer based on hearsay.) What was the rule in your dealings with the Alphin & Lake Cotton Co. in reference to the bills of lading from Junction City?

A. No difference between the dealings with them from there and other points.

Q. I believe — in your deposition the other day that all the bills of lading from Bernice came through your Bank?

58 A. Yes. They didn't keep any account with any other bank here.

Q. Did the same rule prevail as to Junction City? As to the bills of lading passing through your bank?

A. Yes.

Q. From what bank ordinarily did drafts on Alphin & Lake and bills of lading come to this bank from Junction City?

A. From the Citizens Bank of Junction.

Q. Have you a record of drafts that came from that bank to yours, say from December 6th to December 10th or 11th?

A. We have a letter here of the 10th of December enclosing draft on Alphin & Lake for $2904.84, which was paid and credited to the Citizens Bank on the 11th of December.

Q. Does that letter show that bills of lading were enclosed with the draft?

A. It does not.

Q. Does the letter of the Citizens Bank usually show bills of lading were enclosed with the drafts?

A. I don't believe that any of the letters of the Citizens Bank of Junction City gave instructions or indicated rather the enclosure of bills of lading or any other documents, as far as that is concerned, attached to drafts.

Q. Do you know whether or not the letters did actually enclose bills of lading when drafts were sent on Alphin & Lake?

A. Yes; we would not have taken their check for the draft without bills of lading.

Q. From what you know of the dealings between the banks in reference to the enclosure of drafts and bills of lading, can you state whether or not the bills of lading were transmitted in the letter of the Citizens Bank of the 10th of December?

A. My recollection is that we received no drafts from them on Alphin & Lake except those that have bills of lading attached. I don't remember of ever having seen a draft from them on this firm without bills of lading.

59 Q. Then what would you say in reference to that draft?

(Objected to as asking for a guess.)

A. I say it had bills of lading.

(Cross-examination:)

Q. Did the Citizens Bank ever use Compress receipts in its business between you and Alphin & Lake?

A. No.

Q. You say that all the bills of lading from Bernice for the Alphin & Lake Cotton Company came to this bank. How do you know that Alphin & Lake didn't ship a great deal of cotton from Bernice that didn't come to this bank?

A. I didn't so understand the question. My understanding of the question was that all bills of lading that came here from the Bank of Bernice came to us.

Q. How do you know that the Bank of Bernice didn't send drafts to other banks or merchants or individuals in this town?

A. They had no account with any other bank here.

Q. How can you say that they didn't send bills of lading to Mr. Lake personally?

A. I could not say. They may have had dealings direct with him.

Q. How can you say that they didn't send bills of lading to the Bank of Commerce or any other bank in town?

A. I could not say that they didn't. They had no account with any of those banks.

Q. You mean to say they had no regular business with the other banks, so far as you know?

A. No. Of course if they had been requested to send a draft to any bank like any other bank they would be apt to send it there; but the ordinary course of business, I am quite sure they would have sent the business to us.

Q. How can you say Mr. Walker, that every bill of lading that was issued for Alphin & Lake at Junction City came to this Bank?

60 A. I could not say that. I don't mean to have said that.

Q. Then, if there are bills of lading in the hands of the German National Bank which were issued to Alphin & Lake at Junction City and don't bear any endorsement or other indication that they passed through this bank, could you say they passed through this bank?

A. No; I could not identify them without some mark to indicate.

Q. Going to the letter of the Citizens Bank of December 10th supposing that bills of lading were enclosed in this letter, could you say what bills they were?

A. No.

Q. Have you any means of telling what the bills were?

A. No, not unless I could identify it by some mark on the bill of lading.

Q. This letter contains the following language, does it not, "I enclose for collection and credit," and under that a list of items indicating drafts sent.

A. Yes.

Q. Now, the credit for the draft which is included in the enumeration of $2904.84 was made upon your book upon what date?

A. It was credited on the 11th of December.

Q. That would indicate, then, that on that date the drafts enclosed were paid, and if any bills of lading were attached to the drafts, they were released from the lien of that draft, and under the order of the letter would be turned over to Lake.

A. Yes, or retained by us, because he evidently gave a check upon us for the amount.

Q. Is there anything in the letter that tells you to retain the bills of lading to pay yourself?

A. No.

Q. The letter says simply "for collection and credit."

A. Yes.

Q. There is nothing in the letter to indicate that there were any bills of lading?

61 A. No.

Q. Going to the letter of December 6th, from the Bank of Bernice, it shows that it was received by your bank on December 8th?

A. Yes.

Q. Have you any way of telling what bills of lading were attached to the draft enclosed in this letter?

A. No unless marked in some way.

Q. You don't know what bills of lading were attached?

A. No.

Q. You don't know whether any bills of lading now in the hands of the German National Bank were attached to this draft or not?

A. No, I could not say that.

Q. Now, this draft was paid on what date? I mean the draft enclosed in the letter of December 6th from the Bank of Bernice.

A. Paid on the 11th of December and credited on the 12th.

Q. Why do you say they were paid on the 11th?

A. Because the collector stamped when they were paid on the face of the letter. (Letter of December 6th bears the stamp "Paid, December 11th, 1902."

Q. The letter of December 6th does not indicate that any bills of lading were attached, does it?

A. No.

Q. When the Bank of Bernice attached bills of lading to drafts, their letters did indicate it.

A. Sometimes they omitted to. There is one letter of that kind. (Handing to counsel interrogating him.)

Q. Do you know that bills of lading were attached to that?

A. Yes, because we would not have taken his check for the draft unless there was bills of lading attached.

Q. Suppose that the Bank of Bernice sent bills of lading here upon which they had no claim, would you not have taken the bills of lading without the draft?

A. Not if I would know they had no claim.

62 Q. Didn't they send bills of lading when they sent no drafts with them at all?

A. Not that I have any knowledge of.

Q. If Mr. Fuller states that he did send bills of lading without drafts, is your memory such that you can say he didn't do it?

A. I have no recollection of any. He had reference to bills of lading that he did attach to draft, but we didn't know it did belong with the draft; but it was attached to a draft for $5400.00.

Q. Going to the letter of December 8th which enclosed draft for $2801.69, indicating that bills of lading were attached. Can you state what bills of lading were attached to that?

A. No, not unless they were marked in some way to identify them.

Q. Can you state what bills of lading were attached to any one of the drafts?

A. No sir, I could not tell positively what bills of lading were attached to any specific draft. The only thing would be to judge about the date of the drafts and the letter. I could not say positively that would indicate, because sometimes these banks hold bills of lading some days.

Q. Is it possible for you to take the bills of lading in the hands of the German National Bank and tell with what drafts you got any particular one of those bills of lading?

A. No I could not.

(Redirect examination:)

Q. How many bales of cotton did the bills of lading represent that the Bank of Little Rock had when Alphin & Lake Cotton Co. failed?

(Objected to as immaterial.)

A. 215 bales, is my recollection.

Q. I believe you stated you would not have paid the drafts of the Citizens Bank upon Alphin & Lake from Junction City unless bills of lading had been attached?

A. We would not have paid Alphin & Lake's check upon us in settlement of them. Of course, if they gave us a check upon any other bank, we would deliver them the bills of lading, if the check was O. K.'d.

63 Q. Suppose Alphin & Lake had drawn a check upon you to pay a draft which you held on them? Would you have paid that check without bills of lading attached?

A. No.

Q. Would you have delivered up the bills of lading on the payment of their check on you?

A. I would not deliver it to them unless they gave me something in place of it of equivalent value.

Q. What was the understanding between the Bank of Little Rock and the Alphin & Lake Cotton Co. in reference to the right of the Bank of Little Rock to hold bills of lading that were sent to the Bank of Little Rock as collateral for the indebtedness of Alphin & Lake?

Q. There was no understanding other than he was to keep ample cotton in our possession to cover his account with a reasonable margin.

Q. What was the understanding with reference to bills of lading where the Bank of Little Rock paid the drafts attached or referred

thereto? That is, with reference to the right of the Bank of Little Rock to hold the bills of lading?

A. Alphin & Lake never questioned it. It was the understanding. And even on drafts that came through other banks, if they had bills of lading attached and they gave a check upon us in payment of them, the bills of lading attached to drafts were to be attached to the check. The bank who held the draft attached the bills of lading because they knew it was customary among banks not to pay cotton checks of any of the cotton buyers without cotton to protect it.

Q. Then, if I understand, it was the rule for the Bank of Little Rock to hold all bills of lading.

A. It was.

(Recross examination:)

Q. As I understand it, if a draft on Alphin & Lake came to your bank with bills of lading attached, and he drew a check upon you to pay it, these bills of lading were held as against the check.

A. Yes.

64 Q. If he drew the draft upon some other bank to pay it, the bills of lading were attached to the check he drew on the other bank.

A. Yes. When we sent that check up to the bank to be O. K'd, they would O. K. the check take the bills of lading off and keep them. We did the same thing.

Q. So that in the ordinary run of things if bills of lading came, say, from the Bank of Bernice attached to the draft drawn by the Bank of Bernice upon Lake, Lake paid this draft by check upon you, these bills of lading were detached from the draft of the Bank of Bernice, and were held to pay the check that Lake drew upon you.

A. Yes. The drafts were always presented to him with the bills of lading attached so that he could examine them and he always returned them to the collector.

Q. What position did you hold in the Alphin & Lake Cotton Co. or in the El Dorado Compress Company during last November and December?

A. I didn't hold any position in the Alphin & Lake Cotton Co. I didn't know I held any in the El Dorado Compress Company, until after this trouble came up.

Q. What position did you hold?

A. I understood I was director.

Q. Weren't you Treasurer?

A. I don't know that I was. I believe a newspaper man did tell me I was Treasurer, but I wasn't aware of it. I had never any transactions with them as treasurer or otherwise in any way, manner or form.

Q. When you received bills of lading as collateral for Alphin & Lake, did you hold these bills in the custody of the bank always, or did you allow Lake to take them out for one purpose or another, and return them, either the same bills, the same amount of cotton in other bills or in warehouse receipts?

A. No, except on one or two occasions when we were making demands upon him to reduce his account, and he wanted them to get money on, we gave him the bills of lading and he was to return us the money. When cotton would arrive at the El Dorado Compress or at the station there, it was customary for the railroad
65 company, I suppose, to notify him, or somebody, I don't know who. Anyhow, calls were made for bills of lading to deliver for the cars in many cases and in many cases it was not. He would come in with memoranda calling for such and such bills of lading for so many bales of cotton, that had arrived at the Compress, for which he would give due bills for so many bills of lading, calling for so many bales of cotton, stating that they were wanted to send to El Dorado to obtain delivery, and in a day or two he would come back with Compress receipts and take up his due bills.

Q. Didn't he take the bills of lading out of the bank at different times for the purpose of going through them and locating cotton and looking after cotton?

A. Very seldom. He came here and looked over them but never took them away that I can recall.

Q. Didn't he take them away at times?

A. I could not answer that positively. Mr. Johnson could say probably, but I don't recall any instance wherein he did; never with my knowledge.

Q. Wasn't it customary for him to take out bills of lading and substitute others for like amount. Other bills or other warehouse receipts.

A. He would take them out and return to us compress receipts after a few days, as stated above, but never substituted bills of lading. That's the only instance I know of. He wasn't in the habit of coming here and taking out bills of lading just for the purpose of overhauling them.

Q. You never presented a bill of lading at El Dorado for the delivery of cotton, did you?

A. No.

(Redirect examination:)

Q. When you would retain bills of lading after having paid the drafts to which they were attached, would you retain alone as collateral for the particular drafts that you had paid?

A. No I would just retain them on his general account. Of course that draft would be included.

NOTE.—The foregoing deposition of C. T. Walker *were* taken on agreement before Noel Loeb Notary Public in Pulaski County, Arkansas, on the 31st. day of March 1903.

W. J. PINSON, *Clerk.*

66 Plaintiff objects to letter attached to the foregoing deposition of C. T. Walker being read to the jury and the Court

holds that the letter is not proper evidence and refuses to permit same to be read to the jury, to which defense excepts.

(No letter is attached to the deposition. R. & F.)

67 The deposition of C. P. PERRY is here introduced in evidence by the defendant and read to the jury as follows:

Testimony of C. P. Perrie.

C. P. PERRIE, being duly sworn, deposes and says:

Q. State your name and place of residence.
A. C. P. Perrie. Little Rock, Arkansas.
Q. What was your occupation during the fall and winter months of 1902?
A. Employed by the Alphin & Lake Cotton Co. in the office.
Q. At what point?
A. Little Rock.
Q. Do you know anything of the transfer of any bills of lading from Lake to the German National Bank in December, 1902?
A. I don't remember the date. I know Lake carried some bills of lading from the Bank of Little Rock down to the German and got money on them. He got $19,200. That was the transaction.
Q. Do you remember how many bales of cotton were represented in the bills of lading?
A. No. I didn't have my hands upon the bills of lading, and didn't figure them up at all.
Q. Did you take any part in the negotiation of those bills to the German National Bank?
A. I only went down there with him to help him carry the money back up to the Bank of Little Rock.
Q. Did you have the bills of lading in your custody?
A. No.
Q. Did you represent the Bank of Little Rock in any way in that transaction?
A. No.
Q. Whom did you represent as far as you represented anybody?
A. I represented Mr. Lake. I met him on the street as he was going down there, and he told me to come and go down [redacted] with him, that he was going to get some money from the German National Bank.

68 Q. Had you ever been employed in the Bank of Little Rock before that time?
A. Yes.
Q. How long and up to what time?
A. 10 years, up to August, 1902.
Q. Do you know whether the Bank of Little Rock knew that cotton that was shipped from El Dorado, notify Alphin & Lake Cotton Co. care Compress Company, was delivered by the Arkansas Southern Road to the Compress Company?

(Objected to for incompetency and irrelevancy.)

A. I can't answer that. I don't know, because I don't think that the bills of lading heretofore, when I was there, were many of them "shipper's order." I don't know.

Q. Do you know whether during last fall, while you represented Lake, the Bank of Little Rock know that cotton that was coming to El Dorado from the Arkansas Southern was being stored at the Compress?

(Objected to for incompetency and irrelevancy.)

A. You mean being stored at the compress before the bills of lading were sent down there?

Q. Yes.

A. On that, I don't know. Mr. Lake handled that himself with the Bank, and the compress receipts, etc. It never came under my province.

(Cross-examination:)

Q. Where did you meet Mr. Lake when you went to the bank?

A. I met him at 2nd. and Main.

Q. Who was with him?

A. No one.

Q. Didn't you meet Mr. Johnson there at the same time?

A. Mr. Will Johnson the collector there? No, I think not, because I don't remember. He may have been there. I don't remember.

Q. Didn't you and Mr. Lake meet Mr. Johnson there, go back up to the Bank of Little Rock, get the bills of lading, had them endorsed and then take them down to the German?

69 A. That's not my remembrance. I can't say positive. It left no impression upon me.

Q. Your recollection is you didn't meet Mr. Johnson there.

A. Yes.

Q. You might be mistaken as to that.

A. Yes; seeing him as much as I did, I might meet him and it would make no impression upon me.

Q. You did go with Mr. Lake to the German National Bank and get the money?

A. Got $9200 in cash and $10,000 in exchange.

Q. And carried it back to the Bank of Little Rock?

A. Yes.

Q. Did you see him deliver the bills of lading to the German National Bank at that time? He had the bills of lading when you met him there.

A. I don't remember whether he had them or not. I don't remember whether he had them with him or had already taken them down there.

Q. Then your recollection about the details of the transaction are very meagre.

A. The only thing I remember is going down there. I wasn't interested in it at all; I simply went along with him. He thought he was going to get all cash I suppose, and he took me down there to help him carry it back.

Q. Didn't you or he tell the cashier Mr. Walker wanted $10000 in exchange.

A. I don't remember that. Mr. Lake may have told him. Mr. Davis thought at the time I was representing the Bank of Little Rock. He didn't know I had left the Bank of Little Rock and gone to work for Mr. Lake.

(Redirect examination:)

Q. When did Davis think that?

A. We explained it to him then. He turned around and asked me "Does Mr. Walker want so and so? I think I replied, "I don't know" Then some remark was made like "Aren't you with
70 the bank," or something of the kind. I have forgotten the exact words. Then I explained that I wasn't working for the Bank of Little Rock but for Mr. Lake.

Q. You didn't have the bills of lading in your custody for the Bank of Little Rock to keep them for the bank until you got the money for the bank on that occasion.

A. No. I wasn't working for the bank.

Q. Your recollection as to exactly what took place is not definite, but you are not at all uncertain about the fact that you had nothing to do with keeping the bills of lading for the Bank of Little Rock until they got the money back?

A. I had no responsibility in the matter whatever.

Q. Whatever bills of lading were presented were presented by Mr. Lake and not by you?

A. Yes. Mr. Lake may have handed me the bills of lading right there at the bank to give them to Mr. Davis or Mr. Pollock. I have no remembrance of it. I remember I wrote out the check for the money and Lake signed it. I know I didn't count them up or anything of the kind, and my remembrance is that I didn't see or handle the bills of lading.

(Recross-examination:)

Q. Did you not know the bills of lading had come from the Bank of Little Rock?

A. Yes.

A. And you knew that the money was to go back there.

A. Yes.

NOTE.—The foregoing deposition of C. P. Perrie was taken on agreement on March 28th., 1903, in Pulaski County, Arkansas before Noel Loeb a Notary Public.

71 The defense here offers in evidence and reads to the jury the deposition of Y. S. Fuller, taken on behalf of the plaintiff as follows:

Testimony of Y. S. Fuller.

Y. S. FULLER, a witness for the plaintiff, being duly sworn deposes as follows:

Q. You are the cashier of the Bank of Bernice?

A. Yes sir.

Q. How long have you been cashier.

A. Since its organization in November 1901.

Q. I show you the bills of lading in controversy in this case which purport to have been made out in favor of the Bank of Bernice state whether or not those bills of lading came into the hands of the Bank of Bernice and how?

A. They came into our hands, yes sir.

Q. Who delivered them to you?

A. First one and then another, Mr. Green would bring a bill of lading in sometimes and give it to me for the Alphin & Lake Cotton Co., and then Mr. Covington, the weigher would bring it.

Q. Your bank furnished money for Alphin & Lake Cotton Co. to buy cotton?

A. Yes sir, we carried an account with them.

Q. The bills of lading would be brought to you in order to reimburse you for money you had advanced to buy?

A. They were supposed to be our collateral, yes sir.

Q. In advancing money with which to buy cotton what collateral were you supposed to have?

A. Mr. Green would buy cotton either off the yard or a little that the merchants had on hand at a certain price, and he would take those tickets and mark them "O. K. Green" and he would put the price paid for it on the ticket and make the calculation himself in dollars and cents to relieve us of the trouble, and we would pay the price put on it by him and hold that ticket as a warehouse receipt.

Q. How were those tickets taken up?

72 A. Upon the shipment of the cotton. The weigher Mr. Covington would ship cotton sometimes that — were not interested in, that is, it was not our exact number, and we would make an exchange of bales of cotton for bales of cotton it being a hard matter to single them out, and if they got their number of bales we were satisfied.

Q. When bills of lading were made out and delivered to you you would deliver tickets to cover that number of bales?

A. Yes sir, supposed to.

Q. Then would you draw a draft with the bill of lading attached and forward it to the Bank of Little Rock?

A. Yes sir.

Q. For collection?

A. Yes sir.

Q. In that way did the bills of lading I have shown you come into your hands?

A. Yes sir.

Q. And in that way you forwarded them to the Bank of Little

Rock with the drafts attached and your names endorsed on the back?

A. Yes sir.

Q. Were those bills of lading changed at any time after they came into your hands by you?

A. No sir.

Q. You have examined them?

A. Yes sir.

Q. Does there appear to have been any change as to the letters "S. O." signifying Shippers Order, since they passed out of your hands?

A. No sir, all of the bills of lading handed us were supposed to be Shippers Order bills of lading, and they were as far as our investigation shows.

Q. That was your requirement?

A. Yes sir.

Q. I show you now a bill of lading dated December 22nd. 1902 for 48 bales of cotton, state whether or not that came into your
73 hands in the same way as the others?

A. Yes sir.

Q. You drew a draft with the bill of lading attached to it for that amount did you?

A. Yes sir but we never did make any records of the number of bills of lading, or designate which bills were attached to our drafts. The facts of the business are that on one or two occasions, Mr. Covington, knowing the Bank was interested in the Alphin & Lake Cotton would hand us bills of lading covering more cotton than the Alphin Cotton Company owed us and we would attach the whole thing.

Q. Did you attach those?

A. We attached them, and while our books do not show it they show this way, bills of lading for so much cotton attached.

Q. You do not know which draft it was attached to?

A. No sir, this bill of lading might have been with a draft two days later or five days later.

Q. That bill of lading was returned to you was it not?

A. Yes sir, Mr. Lake at that time owed us and this was collateral.

Q. I see it is endorsed on the back, "Deliver to the order of the Bank of Little Rock."

A. Yes sir, that was attached to our draft and was returned to us by the Bank of Little Rock, and I have the draft now.

Q. That bill of lading was turned over by you to the German National Bank?

A. The Bank of Little Rock sent it back to us and I turned it over to the German National Bank in lieu of that duplicate.

Cross-examination:

Q. Mr. Fuller, you say that you directed that all your cotton should be shipped to shipper's order?

A. Yes sir.

Q. Do you control the manner in which the cotton should be consigned?

74 A. Yes sir, we controlled the cotton.

Q. Did you control the manner of consigning it?

A. It was just the manner requested.

Q. Did you request the cotton to be consigned as it was consigned?

A. Yes sir.

Q. So you directed the manner in which the cotton was consigned?

A. Yes sir, we never gave any specific orders we want the bill of lading to be attached and it was supposed to be shipper's order. I did not tell them to notify Alphin-Lake Cotton Co., care Compress.

Q. You knew that was all on there and made no objections?

A. No sir.

Q. How long after the cotton left there before it got to El Dorado?

A. It ought to have got there the first day.

Q. Did you have any agent there to look after the cotton?

A. No sir.

Q. Do you know what became of the cotton after it got to El Dorado?

A. No, sir.

Q. Did you ever make any demand of the company for that cotton?

A. Yes sir.

Q. When?

A. A few days before the Alphin Lake Cotton Company failed. I have a copy of the letter here, it is dated January 15th, 1903. I wrote the letter.

BERNICE, LA., *Jan.* 15, 1903.

Mr. J. M. Walsh, Ruston, La.

DEAR SIRS: We have some bills of lading for cotton "S. O. Notify" returned to us with drafts unpaid, and attached. These bills lading were to El Dorado, Ark. Kindly make this demand for the cotton for the protection this Bank and some of its customers. Awaiting your reply,

Yours truly, Y. S. FULLER, *Cashier.*

75 Q. How did you happen to write that letter?

A. Those bills of lading had been hanging fire up there too long, they had been held unpaid. These bills of lading—there were more than this one, we got some cotton, we paid for the cotton, and when Mr. Quigg came up what cotton was left there we got back.

Q. How did you happen to write this letter?

A. We had some bills of lading for Mr. Tate at Dubach and we simply took them for collection, and would not credit him and they were returned, and we thought the cotton had left Dubach and it had not; they gave the bills of lading before the cotton

was shipped and the Bank of Little Rock returned those drafts because Alphin-Lake Cotton Co. would not take them up.

Q. When was this substituted bill of lading returned?

A. I have no record of the date.

Q. Have you any recollection as to the date?

A. My recollection is it was the day before I made that demand as soon as we got the bill of lading back we wrote that letter. Our record shows it checked off but I did not put the date down. —. ——.

A. I have it somewhere but I do not know how long it would take to find it, we have no regular letter file.

Q. Who usually drew those drafts?

A. I do that myself, by Y. S. Fuller, Cashier.

Q. On the Alphin-Lake Cotton Co.?

A. Yes sir, and in favor of the Bank of Little Rock for the collection and credit. That was our instructions from the Bank of Little Rock.

Q. Do you remember about when you sent this duplicate bill of lading to the Bank of Little Rock for collection, this forty eight bales?

A. I could not tell you.

Q. What was your first draft after the 22nd. of December?

A. I think it was L. E. Tate's draft, dated January 10th.

Q. You think you kept that here until January 10th.?

A. Yes sir.

76 Q. In the ordinary course of things the cotton would have been at El Dorado some 17 or 18 days before that time?

A. I would suppose the cotton had been moved, I do not know. Sometimes they get bills of lading at some places when the cotton is on the ground.

Q. But as far as you could tell that cotton ought to have been at El Dorado from 17 to 19 days before that draft was drawn and you sent the bill of lading to Little Rock?

A. Yes sir.

Q. You had nobody at El Dorado to look after the cotton when it reached there?

A. No sir. We thought the Alphin-Lake Cotton Co. would look after it.

Q. You expected it to go into the compress?

A. We did not have any expectations about it except that Alphin-Lake Cotton Co. would control the cotton, and as to what they done with the cotton when the drafts were unpaid and the bills of lading held I do not know, I did not make any investigation.

Redirect examination:

Q. You expected the Alphin-Lake Cotton Company to pay the drafts and get the bills of lading and get the cotton on them?

A. Yes sir.

Q. What was the amount of the draft drawn against this bill of lading, date- Dec. 22nd, 1902?

A. It was attached to a draft for $4840.00. We have no date of the day it was returned and cannot positively identify which draft that bill of lading was with. My recollection is, that bill of lading was returned with that last draft. We just have a memoranda of a bill of lading for so many bales of cotton attached.

Cross-examination:

Q. You have referred to a book in fixing the date when this bill of lading probably went forward, can you turn to that
77 and tell on what days you sent bills of lading to Little Rock, to the Bank of Little Rock?

A. Yes sir.

Q. Please do so beginning November 22nd., and come on down to January 10th. 1903?

A. December 4th. is the first one after November 22nd. for 558 bales of cotton, $4000.00.

Q. What is the next date?

A. December 15th. $5400.00, 327 bales of cotton.

Q. Are there none between Dec. 4th and December 15th?

A. No sir. We received notice of the payment of the draft dated December 4th., on December 10th.

Q. The one dated December 15th. when did you receive notice of its payment?

A. January 16th. 1903.

Q. You did not get notice of payment until January 16th?

A. No sir.

Q. Is there any other draft now?

A. None except the one that was returned. I cannot recollect whether they were attached in bulk or not, I do not know. I did not intend to draw only against our collateral, and whether they construed it that way I do not know. They paid for cotton here that we did not have any interest in but the bills of lading would be sent in the name of the bank because they knew we were interested in the cotton. The excess collateral was sent to them merely for them to go and get the cotton. We intended to draw just against the tickets we held and our draft was governed by these.

Q. I do not think I quite understand your explanation as to this transaction of December 4th., you drew the draft for four thousand dollars and attached that to bills of lading for 558 bales of cotton?

A. As to whether I attached them all I do not know, I sent it to the Bank of Little Rock and regarded it as their collateral for the Alphin-Lake cotton, and a great many of them were made out in our favor that we did not own.

78 Q. Who did own it?

A. The Alphin-Lake Cotton Co.

Q. Against those 558 bales of cotton you had a claim for only $4000.00?

A. Our claim was only that less what tickets we had on hand. We would always hold enough tickets for our balance.

Q. When you drew that $4000 draft that was intended to cover your whole claim against the cotton?

A. Yes sir.

Q. Then the balance of that belonged to the Bank of Little Rock?

A. We supposed it did.

Q. How do you know it did?

A. Because they paid for that I suppose.

Q. You do not know more than just a general supposition?

A. No sir. Some of our records are not very plain, we made no real explicit record, just made a memoranda on the margin of the record, but occasionally Mr. Green would draw a draft and it would hang fire, and some of those bills of lading were made out, say like Henderson Bros. would sell Green one hundred bales of cotton, and that would hang fire and that bill of lading would be made out in the name of the Bank to secure its customers. That is the way some of those excess bills of lading would be issued. In the early part of the season Mr. Green would draw the drafts himself, we were not carrying any cotton in the earlier part of the season.

Q. You drew against that cotton for the only claim you had against the cotton?

A. That was our intention.

Q. When that four thousand dollar draft was paid that satisfied all the claims you had against the cotton?

A. Yes sir.

Q. It was at liberty to be turned over to Alphin-Lake Cotton Co. as far as you were concerned?

A. Yes sir.

Q. Your next bill of lading was for 327 bales of cotton,
79 how much did you draw against that?

A. $5400.00.

Q. When that draft was paid it paid all the claim you had against it?

A. Yes sir.

Q. As far as you were concerned the Bank of Little Rock was at liberty to turn over the cotton to Alphin-Lake Cotton Co.?

A. Yes sir.

Plaintiff excepts to the above cross examination as to cotton and bills of lading and drafts as immaterial.

Redirect examination:

Q. You do not know whether any of your drafts by persons from whom Mr. Green bought cotton accompanied those bills of lading?

A. They would not be attached to Green's drafts because he would buy it and attempt to pay for it in cash.

Q. You speak of Green drawing drafts in buying from other persons, would he draw through your bank?

A. No sir, he would draw a draft, say in favor of Henderson Bros. to the Alphin-Lake Cotton Co. we would forward it, and they would hang fire frequently and the cotton would be moved out from there, on those drafts it was intended to protect the customers here.

Q. Might not those 558 bales of cotton on which you drew December 4th. had other drafts accompanying besides your own?

A. Not accompanying it, no sir.

Q. You regarded that as collateral of the Bank of Little Rock?

A. Yes sir.

Q. It was your understanding that the Bank of Little Rock had been furnishing money that you did not furnish?

A. Yes sir.

Q. You were doing business with the Bank of Little Rock?

A. Yes sir.

Q. They were your correspondents?

A. Yes sir.

Defendants here objects to this form of examining the witness, same being leading.

80 Q. The Bank of Little Rock, when it furnished money to Mr. Green to buy cotton how did it come?

A. He would draw a draft on Alphin-Lake Cotton Co. at Little Rock in favor of the man he purchased the cotton from.

Q. Would he attach a bill of lading?

A. No sir. That draft would be handed in to us for credit and we would endorse it and send it in to the Bank of Little Rock for collection and credit.

Q. How would the Bank of Little Rock credit it?

A. Credit the account with the Bank of Bernice.

Q. You gave your customer credit for the draft and would forward the draft to the Bank of Little Rock and they would give the Bank of Bernice credit?

A. Yes sir.

Q. Why did you regard the excessive number of bales or bills of lading as the collateral of the Bank of Little Rock?

A. I had heard they were carrying an account there and were paying for it, and we would ship it out to protect those drafts. They would hang fire up there sometimes and we had a great deal of trouble.

Q. Green would draw drafts in favor of customers?

A. Yes sir.

Q. And those customers would put them in the Bank and you would forward them to the Bank of Little Rock for collection?

A. Yes sir, and they credited us with the amount. That was in the early part of the season. If we had any account up there we would turn over our tickets and get bills of lading and send them on and the shipper did not know whether those drafts were paid or not; they were really intended to be delivered to the Bank of Little Rock and then to the Alphin-Lake Cotton Co.

Q. Just explain again without anything further being asked you how and why was it you regarded these bills of lading which you

made out in your own name for cotton in excess of what you drew against as the collateral of the Bank of Little Rock.

81 A. No more Mr. Fletcher than I had heard and knew they were carrying the Alphin-Lake Cotton Co., and if it was not their collateral when it was made out that way it would have been turned over to Alphin-Lake Cotton Co. The shipper would make out drafts in favor of the Bank of Bernice. Those excessive bills of lading just occurred on those two drafts.

Q. You would forward them when made that way to the Bank of Little Rock?

A. Yes sir.

Q. Ostensibly for the Bank of Little Rock to get hold of it and if it was not theirs they could turn it over to the Alphin-Lake Cotton Co.?

A. I thought they could get it if they paid the drafts.

Q. All of the bills of lading made out here in your name were sent to the Bank of Little Rock?

A. Yes sir.

Q. Were any of them sent without drafts attached?

A. I cannot remember but I think we sent one or two when had cotton tickets to cover it, but I cannot state positively.

Q. Does your draft correctly state every draft you drew with bill of lading attached?

A. I can't tell which bills of lading were attached to them.

Q. Does your record show every draft?

A. Yes sir, every draft with a bill of lading. I just have it marked in the column for remarks, bills of lading for so many bales of cotton.

Q. When a bill of lading would be delivered to you how long would you hold it?

A. We made it a rule to forward them promptly to Little Rock and when they were held we permitted it to be done by letter or telegram.

Q. You would not hold the bills of lading here?

A. No sir, not after it was delivered to us.

Q. You would forward them to the Bank of Little Rock as soon as you got them?

82 A. Yes sir.

Q. Where would they be held?

A. In the Bank of Little Rock. There was one which Mr. Green thought we had used and it was on file in the agent's office down here, and what we done about that I don't know, do not know whether it is among those bills of lading or not. It is our rule to use the bills of lading as soon as we received them.

Q. Did you send any bills of lading you did not draw drafts with?

A. My recollection is I sent several.

Q. Would you keep any record of them?

A. No sir. The books just show bills of lading for so many bales of cotton sent.

Q. Did you send any of them to Alphin-Lake Cotton Co. or did you send them all to the Bank of Little Rock?

A. All to the Bank of Little Rock.

Cross-examination:

Q. Do I understand you to say that on the 4th. day of December you sent bills of lading for 558 bales of cotton from here?
A. I think that is the date.
Q. You sent all of those one day?
A. I think we did.
Q. Then you sent 327 on the 15th. of December?
A. Yes sir.
Q. They were all sent together?
A. I think they were, yes sir.
Q. You think you may have sent a few bills without drafts attached?
A. Yes sir, my recollection is several.
Q. Those you had no claim on?
A. Yes sir, it was individuals.
Q. Those were made to the order of the Bank of Bernice?
A. Yes sir.
Q. And the Bank of Bernice endorsed them.
A. Yes sir.
Q. Whose cotton was it?
A. It would belong to different ones.
83 Q. It was Alphin-Lake Cotton Co.'s cotton?
A. Yes sir.
Q. You had no claim on the bills of lading and sent them there to be delivered to the Alphin-Lake Cotton Co.?
A. Yes sir.

Redirect examination:

Q. Why did you not send those tickets to Alphin-Lake if you regarded it as their cotton?
A. I thought they could deliver them if they wanted to.
Q. Did you regard the Bank of Little Rock as having any interest in the cotton?
A. Yes sir, I regarded them as paying for that cotton. They did not instruct me nor I did not instruct Mr. Covington what to do with it, and in fact we did not know whether Alphin-Lake Cotton Co. was even or whether they owed us $5000.00. We delivered it to the order of the Bank of Little Rock. I regarded them as knowing what they held and did not hold and was humble enough to turn it over. We done it all the year before and it worked off all right and I did not know any better; but I would not let a bill of lading be made out in favor of the Bank now.

Cross-examination:

Q. Those bills of lading were made in your name simply for the purpose of securing what was due you?
A. No sir, others. For instance, Henderson Bros. would sell cotton and we were not paying for it, and he would direct Mr. Covington not to ship that cotton and the draft would hang fire in Little Rock for a week or ten days, and Henderson Bros. would say do not let it go unless you send a bill of lading attached.

Q. That was when the seller of the cotton took a draft, it passed through this Bank for the purchase money?

A. Yes sir.

Q. And in those instances the bill of lading was made to you to protect the seller?

84 A. Yes sir. There were some bills of lading made out not for our protection however. They never instruct us from Little Rock as to how to do.

Q. You did not represent them?

A. No sir.

Q. You had not any right to represent them and did not know the state of their account?

A. No sir. Mr. Covington would make out the bills of lading over there and in the early part of the season Mr. Green bought cotton and they paid for it up there.

Q. You were not informed by the Bank of Little Rock as to their standing with the Alphin-Lake Cotton Co.?

A. No sir.

Redirect examination:

Q. You were their correspondent at this place?

A. Yes sir.

Q. Did I understand you to say a short while ago that this same custom has prevailed for two years?

A. Yes sir.

Q. Were any objections made to it by Mr. Lake?

A. None whatever. When he had no interest in the bill of lading he just simply delivered it to the Bank of Little Rock.

Cross-examination:

Q. You did that because they were your correspondents?

A. Not exactly, we was not carrying them, but the latter part of the season we commenced paying for it here.

Q. When did that begin?

A. About the first of December or earlier. It was this way, we commenced to pay for cotton Mr. Green would buy off of the streets in small lots and the Bank of Little Rock would pay for the big lots when I would not agree to take it for them, but I would pay for these small lots and hold it as ours. Later in the season if a man had fifty bales of cotton here and the Alphin-Lake Cotton

85 Co. was not owing us very much we would pay for it.

NOTE.—The foregoing deposition of Y. S. Fuller was taken at Bernice, La. on March 20th and 21st, 1903, before J. E. Furgerson a Justice of the Peace.

W. J. PINSON, *Clerk.*

86 *Testimony of H. W. Anderson.*

H. W. ANDERSON, a witness for the defense, being duly sworn testified:

Q. Are you in the employ of the defendant Company, the Arkansas Southern R. R. Co.?
A. I have been but am not at the present time.
Q. Were you during last fall and winter?
A. Yes sir, at Bernice.
Q. In what capacity?
A. As agent.
Q. Are you the Anderson whose name is signed to bills of lading for cotton to be shipped by the Bank of Bernice to El Dorado?
A. I do not know whether I am or not.
Q. These bills of lading? (Showing witness the bills — lading sued on.)
A. Yes sir.
Q. Who made out these bills of lading?
A. The cotton yard man, Covington.
Q. Were they all made out complete when they were sent to you for your signature?
A. Yes sir.
Q. Did you direct him how to make them out?
A. No sir.
Q. Did Covington have any connection with the Railroad?
A. I guess not, that is I had no instructions from the Company that he was in any way connected with it, he was simply a weigher and shipper of cotton. He kept the cotton yard and weighed and shipped the cotton, loaded it.
Q. Who stored cotton there with him?
A. Different parties, the merchants.
Q. The merchants and farmers.
A. I do not know whether any farmers did or not, I had nothing to do with them at all, and if I have I have forgotten it, but the merchants deposited the cotton on the cotton yard subject to their orders.

Cross-examination:

Q. This is the usual form of bill of lading used by you at that place?
87 A. Yes, sir, at that time.
Q. Have you ever been authorized to issue any other kind?
A. That is the kind we used at that time.
Q. Had any other bill of lading been presented to you or one with any other conditions than these would you have signed it without express authority from the Company?
A. No sir.
Q. Did you have such authority?
A. No sir.
Q. That is the only kind of bill of lading you ever issued?
A. Yes sir, as far as I know.

Q. Did you have any more than one rate for cotton shipped from that place to El Dorado?
A. No sir.
Q. What was that rate?
A. $1.25 per bale, 25 cents per hundred.
Q. That would be $1.25 for a 500 lb bale?
A. Yes sir.
Q. That was the only rate you had?
A. Yes sir.

Redirect examination:

Q. Did the shippers named in this bill of lading ask you for any other form of bill of lading?
A. No sir.
Q. If they had asked you for any other form would you have notified the company?
A. I would have asked the company for directions.
Q. They did not complain at any time of this form or ask you for any other?
A. No sir.
Q. When you stated while ago that you had no other form of bill of lading except these do you mean that you had no other form except what is printed here?
88 A. Yes sir, the printed form, the blank.
Q. As far as the writing is concerned, what about that?
A. I had no reference to that.
Q. As far as the pencil writing in this is concerned that was not written by you nor by your directions?
A. No sir.

Cross-examination:

Q. You signed your name as agent of the R. R. Co. to it?
A. Yes sir.
Q. If a person had come to you and asked for any other kind of bill of lading or rate you would have refused it?
A. We have only one kind for cotton and we cannot issue a bill of lading for cotton except a cotton bill of lading. A shipper had to take that or none.

Redirect examination:

Q. You mean by that, that was all the form you had?
A. Yes sir, we are furnished a form and are supposed to use that form and the company instructs us.
Q. If the shipper had asked for another form you would have reported his request?
A. Yes, sir, and followed their instructions.

Cross-examination.

Q. As it stood the shipper had no option between this and another form of bill of lading?
A. I had no other.

Q. Did you ever issue any other kind of a bill of lading for cotton?

A. Not that I am aware of.

Redirect examination:

Q. The reason of that was you had no other?

A. Yes sir, I furnished the cotton man here a tab of blanks and he filled them out and brought them over.

Cross-examination:

Q. That is all the kind you had.

A. Yes sir.

89 *Testimony of C. D. Govan.*

C. D. GOVAN, a witness for the defense, being duly sworn testified:

Q. Here are two bills of lading that were signed by the agent at Junction City for two shipments of cotton by the Alphin-Lake Cotton Company, consigned to the Alphin-Lake Cotton Co., care Compress Co., El Dorado, Arkansas, please state who those bills of lading were made out by?

(Showing witness the two bills of lading sued on that were issued for shipment from Junction City.)

A. By Mr. Ramsey, the yard man.

Q. Who directed him how to fill out the blank part of the bill of lading?

A. I directed him to ship it care of the Compress and he always knew where to ship it, and the only thing that I told him was to ship it care of the Compress. That was not on these special bills of lading but directions were given him early in the season.

Q. The directions were changed in the early part of December, who changed them?

A. The Bank would not take anything except a Shipper's Order Notify.

Q. But the consignment to care of the Compress was not changed?

A. No sir.

No cross-examination.

90 *Testimony of H. W. Anderson.*

H. W. ANDERSON, a witness for the defense, recalled, testified:

Q. At what time were bills of lading issued for cotton at Bernice, before or after the cotton was on the car?

A. After it was on the car.

Q. From the time the cotton was loaded into the car how long was it before it left Bernice?

A. Sometimes it left the same day and never later than the day after.

Q. How far is it from Bernice to El Dorado?
A. 32 miles I believe.
Q. Junction City is between Bernice and El Dorado is it not?
A. Yes sir.
Q. At what time would a train leaving Bernice usually reach El Dorado? What time would it take to run that distance?
A. From about 11 or 12 o'clock in the morning until five in the afternoon.
Q. It would reach El Dorado the same day?
A. Yes sir, reach it in the afternoon after leaving Bernice in the morning.
Q. The bill of lading was not issued until the cotton was in the car?
A. Yes sir, that is right.
Q. And the cotton left that day or the next day and reached El Dorado the day it was shipped?
A. Yes sir.
Q. Is El Dorado the end of the Arkansas Southern Railroad?
A. Yes sir, one end of it.
Q. The north end?
A. Yes sir.
Q. What is the length of the line?
A. One hundred and one miles I think.
Q. The freight trains that this cotton was all shipped on to El Dorado started from what point?
91 A. From Ruston, La.
Q. That is a distance of about 54 or 55 miles from El Dorado?
A. Yes sir, about that .

Cross-examination:

Q. You say those cars came out the same day they were loaded?
A. Not invariably, but as a usual thing they did. Sometimes if they were loaded in the afternoon they could not get out until the next morning.
Q. Would it not often be that the train was too heavily loaded to take them out?
A. We usually give cotton the preference.
Q. Did it not often happen that you could not send it out the same day by giving it that preference?
A. I would not say but we tried to get the cotton out, and if there was any cotton ready we tried to get it out on the first train North regardless of other loads.
Q. You did not always succeed in that?
A. We never missed it more than a day.

92 *Testimony of W. H. Hutchinson.*

W. H. HUTCHINSON, a witness for the defense, testified:

Q. What is your name?
A. W. H. Hutchinson.
Q. You live here in El Dorado?
A. Yes sir.
Q. How long have you lived here in El Dorado?
A. Four years tomorrow, October 10th.
Q. What work have you been engaged in?
A. Agent for the Arkansas Southern R. R Co.
Q. How long have you been agent for the Arkansas Southern Railroad?
A. Four years.
Q. You were joint agent for the Arkansas Southern and the Iron Mountain during this time were you not?
A. Yes sir.
Q. And are still acting in that capacity?
A. Yes sir.
Q. Just state to the jury in your own way how the cotton in controversy in this suit, what was done with it when it got here?
A. It was delivered to the Compress as soon as it was received.
Q. I refer now to the cotton covered by the bills of lading introduced here, state what was done with all that cotton, was it all delivered to the compress?
A. As far as I know it was.
Q. Have you checked it up with your compress book?
A. No sir, I have not. I checked the cotton but not from these bills of lading.
Q. I will take the bills of lading and you take your book and state the dates these different cars were delivered to the Compress Company. Here is No. 172, dated Dec. 5th. 1902, 24 bales of cotton, A. S. 216, shipped by Alphin-Lake Cotton Co. and consigned to themselves, care of the Compress at El Dorado, Arkansas?

93 A. Yes sir.
Q. What did you do with that?
A. Delivered it to the Compress on December 7th.
Q. No. 173, dated Dec. 6th, 1902, 24 bales of cotton, Car No. 207?
A. I delivered that the same date, December 7th.
Q. This one is issued from the Bank of Bernice and consigned to the Alphin-Lake Cotton Co., care of the Compress, cars No. 243 and 248, 48 bales of cotton.
A. That was delivered December 26th. to the Compress.
—. Here is one dated November 22nd., 25 bales of cotton in car No. 241 A. S.?
A. I delivered it to the Compress November 26th.
Q. That is the date of the unloading at the Compress?
A. Yes sir.
Q. That does not show the date it arrived?
A. No sir.

Delivered November 26th.

Q. November 24th. one car marked A. S. 218, 24 bales?
A. Delivered November 26th.
Q. November 24th. one car marked A. S. [redacted] 24 bales? 212
A. Delivered November 26th.
Q. The next one is dated November 25th., forty nine bales in two cars one No. 225 A. S.?
A. 25 bales in that car and delivered November 28th.
Q. Car No. 244?
A. 24 bales, delivered November 27th.
Q. The next is November 26th., three cars, 25 bales in two and 24 bales in one, all A. S. Cars. Take No. 235?
A. 25 bales, delivered November 27th.
Q. Take car No. 241?
A. 25 bales, delivered November 28th.
Q. Take car No. 218?
94 A. 24 bales, delivered November 28th.
Q. Nov. 28th. Car No. 221 marked A. S.?
A. 24 bales, it does not show that it was delivered.
Q. What is your recollection of that car?
A. I am sure it was delivered to the Compress but it is not signed on the book here.
Q. Do you remember how it was that was not signed?
A. No sir.
Q. You say you are sure that was delivered to the Compress, explain why you are sure?
A. Because all the cotton that came in was delivered to the Compress and I do not know why this was not signed for.
Q. Was any complaint ever made to you about that car?
A. No sir.
Q. Would your books show the train that brought that car in?
A. Yes sir.
Q. Will you look that up tonight and see if that car came in in a train?
A. Yes sir.
Q. November 28th., Car No. 233?
A. 24 bales, delivered December 2nd.
Q. The next one is dated November 29th., three cars all marked A. S., one numbered 230?
A. 24 bales, delivered December 2nd.
Q. No. 231?
A. 24 bales delivered December 2nd.
Q. No. 232?
A. 24 bales delivered same date, December 2nd.
Q. The next is dated December 2nd., four cars, each holding 24 bales, marked A. S.; take No. 104 first.
A. 24 bales delivered December 4th.
Q. No. 217?
95 A. 24 bales, delivered December 4th.
Q. No. 235?
A. 24 bales delivered December 4th.
Q. No. 218?

A. 24 bales, delivered December 4th.
Q. The next is December 3rd. five cars, all marked A. S.; take the first one, No. 232?
A. 24 bales, delivered in December, date not given.
Q. No. 233?
A. 24 bales, delivered December 7th.
Q. No. 202?
A. 24 bales, delivered December 7th.
Q. No. 212?
A. 24 bales, delivered December 7th.
Q. No. 240?
A. 24 bales, delivered December 7th.
Q. December 3rd. two cars, both marked A. S.; take the first one No. 243?
A. 25 bales, the date of delivery not shown. One bale short.
Q. What is your recollection about that?
A. I do not remember, I would have to look up the record on that.
Q. The next one, No. 102?
A. 24 bales, date of delivery not given.
Q. Is that receipted for?
A. Yes sir.
Q. What month?
A. The month is not given.
Q. The next one is December 4th., Car No. 243 A. S.?
A. 25 bales, that is the same one I gave just now.
Q. The other was December 3rd., did you find No. 242?
A. Yes sir, and it shows it was delivered to the Compress 12/7.
96 Q. No. 102?
A. The same way.
Q. December 8th. 1902, one car No. 208 A. S.?
A. 26 bales, shows here delivered December 7th.
Q. Car No. 208?
A. Yes sir, 26 bales.
Q. December 9th., three cars, 25 bales each, marked A. S.; take the first one, No. 228?
A. 25 bales, *dated* delivered December 10th.
Q. No. 240?
A. 25 bales, delivered December 10th.
Q. No. 212?
A. 25 bales, delivered December 10th.
Q. The next is December 9th., three cars marked A. S.; take the first one No. 202?
A. 25 bales delivered December 10th.
Q. No. 233?
A. 24 bales, delivered same date.
Q. No. 232?
A. 25 bales, delivered the same date.
Q. December 10th. is next one, 5 cars; the first one is C. R. I. & P. No. 56314?
A. 30 bales, delivered December 12th.

Q. The next one is St. P. M . & O. No. 4168?
A. 30 bales delivered December 12th.
Q. Take the next one?
A. 30 bales delivered December 10th.
Q. No. 243?
A. 23 bales, delivered December 10th.
Q. No. 102?
A. 23 bales, delivered December 10th.
97 Q. In what way were those receipts taken by the Railroad Co. from the Compress?
A. This book is all I had.
Q. How did you manage the book, did you send the book over to the Compress?
—. ——.
Q. Where was that book kept?
A. In my office, and part of the time at the Compress.
Q. When was it sent to the Compress, with the cotton or after it was received?
A. After it was received, we write it up and then send it over to the compress.
Q. After you received it at the depot you entered it on the books and made a memoranda there, and then switched the cotton over to the Compress and sent that book over there?
A. Yes sir.
Q. What was the usual custom of the Compress with reference to reporting any shortage?
A. If there was any shortage they were to report it before they unloaded it and we would send a man over to check it up.
Q. How long would that book remain there before it would be returned to you?
A. At times it might be a day or two when there was no cotton coming in.
Q. Why did you deliver the cotton to the El Dorado Compress?
Q. It was billed that way.
Q. Do you mean by that it so stated in the bill of lading?
A. It did in the way bill, I did not see the bill of lading, I suppose that was taken from the bill of lading.
Q. Had you also seen bills of lading that were in use and knew how they were being made out?
A. Yes sir.
98 Q. And the way bill showed you how the cotton was billed?
A. Yes sir.
Q. You saw from that it was billed in care of the Compress?
A. Yes sir.
Q. How did you get these bills of lading that were issued for the cotton that was shipped from Bernice and Junction City up to El Dorado, and which were turned over by you to the Compress?
A. Mr. Lake would send them to me and some were given to me by the compress people.
Q. Who was in charge of the compress at El Dorado?
A. Mr. J. P. Wright I believe.

Q. What position did he occupy at the Compress?
A. Manager I believe.
Q. What position did Mr. Lake occupy with reference to the Compress?
A. President.
Q. Where did he live during the last cotton season?
A. At Little Rock.
Q. Where did Mr. Wright live?
A. He boarded here in El Dorado what time he was here.
Q. Was it your understanding or not that the cotton turned over to the Compress was to be delivered by the Compress Company to any one before these bills of lading were returned?
A. No sir, not to be delivered until the bills of lading were taken up.

Objected to by plaintiff, objection sustained by Court and defendant excepts.

Q. Just state what requests you made of the compress people for bills of lading from time to time?
A. I asked them from time to time if they had any bills of lading.
99 Q. Did they deliver you bills of lading from time to time?
A. Yes sir.
Q. Did the Arkansas Southern Railroad Company have any cotton yard or warehouse here at El Dorado?
A. No sir.
Q. How much storage room did they have here on their tracks?
A. It is a joint track, they have equal rights with the Iron Mountain, and I could not say how many cars we had room for.
Q. How much room did you have for cars that could remain there and yet the work of the two companies be done?
A. Our yard was blocked nearly all the time until we got in a new track this summer.
Q. Was the El Dorado Compress a place that was well known here?
A. Yes sir.
Q. How long had the Arkansas Southern Railroad Co. been delivering cotton in this way and storing or delivering it to the El Dorado Compress Company, for what length of time?

Objected to by plaintiff, objection sustained by the court and defense excepts.

Q. Had it been the general custom of the defendant Company since the time the Compress was built here at El Dorado, as much as three years ago, to store cotton at the Compress for the benefit of the holder of the bill of lading?

Objected to by plaintiff, objection sustained by the court and the defendant excepts.

Defendant offers to prove by this witness that it had been the usual custom and usage at this place for the past three years for the cotton shipped on the Arkansas Southern Railroad to El Dorado to be delivered to the Compress for the benefit of the holder of the bill

of lading and that this usage was well known at this place,
100 which the Court refuses to permit, and to which ruling of the court the defendant excepts.

Court here adjourned until tomorrow morning at 8:30.

Saturday morning October 10th., the trial of this cause being resumed the witness W. H. HUTCHINSON on cross examination by plaintiff testified:

Cross-examination:

Q. I believe you stated you were the joint agent of both of the railroads at this place?
A. Yes sir.
Q. Did the Arkansas Southern Railroad Co. deliver cotton that came in on its road to El Dorado at any other place than the El Dorado Compress?
A. No sir.
Q. Did it have any other place for delivery?
A. No sir.
Q. What platform space did it have for the delivery of cotton?
A. They had no cotton platform at all.
Q. The compress was the only place they had for the delivery of cotton?
A. Yes sir.
Q. That was where all the cotton was delivered?
A. Yes sir.
Q. You have testified in reference to the cotton that came in over the Arkansas Southern Railroad in the case pertaining to the affairs of the Alphin-Lake Cotton Co. in Bankruptcy?
A. Yes sir.
Q. What you testified there is correct?
A. Yes sir.

Q. For whose account was all the cotton that came in over
101 the Arkansas Southern Railroad to El Dorado bought?
A. It was delivered to the Compress Company as billed.
Q. For whose account was it delivered?
A. For both, they would bring the bills of lading.
Q. Did you not state in the Alphin-Lake Cotton Co. matter it was delivered there for the account of the Alphin Lake Cotton Co.?
A. I think not.
Q. Did you not state as follows: "The statement here as to amounts paid on incoming freight over the Arkansas Southern Railroad does not show the number of bales, do you know anything about the number of bales?" To which you answered: "No, because the Arkansas Southern has no way bills and I could not give you the amount without them." Did you state that?
A. State that again.
Q. Did you not state as follows in answer to the following question: "The statements here as to amounts paid on incoming freight over the Arkansas Southern Railroad does not show the number of bales, do you know anything about the number of bales?" To which you

answered "No, because the Arkansas Southern has no Way Bills and I could not give you the amount without them." Did you state that?

A. Yes sir, that is correct.

Q. Did you make this statement in answer to the following question: "Most of the cotton coming in over the Arkansas Southern Railroad went into the Compress?" To which you answered: "Yes?"

A. I stated that.

Q. It went there to the Alphin & Lake's account?

A. If I remember right all the cotton billed to the Alphin-Lake Cotton Co. went to the Compress, if I remember right all was billed that way"?

A. Yes sir, I stated that.

Q. Did you not make the following answers to the following questions:

102 Q. Did not most of the cotton billed over the Arkansas Southern Railroad go into the Compress? A. All that came over the Arkansas Southern Railroad went into the Compress." Q. Was it not all billed to Alphin & Lake that went in there? A. Yes sir."

A. It went in there the way it was billed.

Q. Did you make the following answer to the following question: "Q. All that came in over the road and went into the Compress was billed to them? A. Yes sir." That is true?

A. Yes sir.

Q. Did you make the following answer to the following question: "Q. And went into their account there? A. Yes sir, I suppose so." Was not that the way you answered it?

A. I suppose it was.

Q. You were better informed then and it was fresher in your mind?

A. Yes sir.

Q. Did you make the following answer to the following question: "Q. That is what these freights cover? A. Yes sir."

A. Yes sir.

Q. From whom did you collect the freights?

A. From the Alphin-Lake Cotton Co.

Q. On the freights coming in?

A. Yes sir.

Q. How soon after the cotton was delivered?

A. I usually collected every Monday, sometimes during the month.

Q. You collected the freights on the cotton in controversy now in the same way?

A. All but one car I think, I paid it myself because I could not get it out of the Alphin-Lake Cotton Co.

Q. But you did present the freight bills to the Alphin-Lake Cotton Co. for this cotton?

A. I drew on them at Little Rock through the Bank of El Dorado.

103 Q. Those bills showed the car numbers and stated you were drawing for freight?

A. Yes sir.

Q. And it was for the specific cotton involved in this case?
A. Yes sir.
Q. That was done each week?
A. Yes sir.
Q. About every Monday?
A. Yes sir, always on Monday and sometimes during the week.
Q. In delivering the cotton to the Compress Company were there any other directions given to them than that contained in this little book you have?
A. No sir, I think not.
Q. Nothing was ever said about it in any other way?
A. No sir.
Q. You just delivered it there by that little book and that was all that passed between you?
A. Yes sir. I asked the Compress several times if they had bills of lading and several times they turned them over.
Q. Who was the person that turned them over as a rule?
A. Mr. Lake.
Q. You looked to him to deliver you the bills of lading?
A. Yes sir, but I received a great many from the Compress.
Q. It was always expected by you that Lake would produce to you the bills of lading?
A. Yes sir.
Q. Did you ever require the Compress Company or any one to deliver you a bill of lading when you delivered the cotton to the Compress Company?
A. Not at the time it was delivered. No sir. But the Compress Company knew the cotton was not to go out until the bill of lading was turned in.
104 Q. How did they know that?
A. Mr. Lake was president of the Compress Company and Mr. Wright had been getting bills of lading and giving them to me
Q. Did you not know cotton was going out without bills of lading being produced?
A. No sir. We had it going in and coming out all the time and I had supposed there was enough there to cover that.
Q. You were looking to Lake for that?
A. Yes sir.
Q. You gave no directions to them not to let the cotton go out without bills of lading?
A. No sir.
Q. You never demanded these bills of lading of the Compress Company when the cotton went in there?
A. No sir.
Q. Mr. Wright brought you some bills of lading afterwards?
A. Yes sir.
Q. That then is why you say the Compress Company knew that—was it not going out without bills of lading being produced?
A. Yes sir.
Q. But you were looking to Lake all the time for that?
A. Yes sir.

Q. Is it not a fact that bills of lading were issued by the Iron Mountain to the Arkansas Southern Railroad to send out cotton for outward shipments from that compress over the Iron Mountain for more cotton than was in that compress at the time; at a time when you delivered cotton without taking up bills of lading; at a time when there were more bills of lading outstanding than there was cotton in the compress during the time you were delivering cotton without a surrender of the bills of lading?

Objected to by the defendant because it is immaterial as they claim, and the court says at this stage it is a little hard for the court to pass upon the question and the point developed by this question is one that will be settled by the court in the instructions as
105 to whether or not the Arkansas Southern Railroad completed its duty in delivering the cotton to the warehouse; and the court permits the question to go in at present and if not proper later it will be withdrawn from the jury, to which ruling of the court the defense excepts.

Q. What road took out, or over what road was the cotton shipped out that went into the compress?

A. Last season it all went out over the Iron Mountain.

Q. Did not the Iron Mountain issue bills of lading for cotton without the actual receipt of the cotton?

Objected to by defense, objection sustained by the court and plaintiff excepts.

Q. Bills of lading were issued by the Iron Mountain on Compress receipts of this Compress Company were they not?

A. Yes sir.

Objected to by defendant, objection overruled by court and defense excepts.

Q. At times there were bills of lading outstanding that had been issued by the Iron Mountain Railroad for more cotton than was in the Compress was not there?

A. Yes sir.

Objected to by defense, objection overruled by the court and defense excepts.

Q. You were frequently urging the Compress Company and Alphin-Lake Cotton Company to ship out the cotton on the bills of lading held by the Iron Mountain were you not?

A. Yes sir, and lots of times we had more cotton than we had bills of lading for and again we were short.

Q. Was it not during last fall you were urging them frequently to ship out cotton?

A. Yes sir.

Q. And did you not ascertain there was not enough cotton on hand to meet the bills of lading?

106 Q. Yes sir, several times.

Q. About what time did you make that request?

A. I could not give you the dates, off and on through the entire season.

Q. How many times did you count to ascertain if there was cotton enough there to meet the bills of lading?

A. I could not say.

Q. That was a frequent occurrence?

A. Yes sir.

Q. You were delivering cotton to the Compress Company without taking up bills of lading during that time you were short on cotton, and all through the season?

A. Yes sir.

Q. And the fact that you knew there was not cotton enough there to meet the bills of lading did not change your course with reference to delivering cotton?

A. No, but the cotton on hand belong- to Alphin & Lake and Mr. Lake said that he would have more than enough to cover everything.

Q. Did you not count along through the season, say November and December and see there was not enough cotton there?

A. Yes sir, several times; it would be short one week and may be over the next week.

Q. Did you not write to Mr. A. R. Bragg to that effect?

A. Yes sir.

Q. Did you not write one time that you were very far behind?

A. Yes sir.

Q. How far were you behind then?

A. All the way from—well I could not say how far, could not give you the amount.

Q. Do you not know that in addition to the amount of cotton on hand that the Iron Mountain was issuing bills of lading to three or four times the amount of cotton on hand?

107 Objected to by defense, objection sustained by the Court and plaintiff excepts.

Q. In counting the cotton to see whether or not there was a shortage did you simply count the cotton in the Compress or the cotton on Faulkner's platform also?

A. At times both places and again just in the compress.

Q. Why did you count Faulkner's?

A. Because Lake said it was his cotton, but I found out when they failed that there was not any of it his.

Q. In counting Faulkner's you found they were short?

A. I do not know, I would ask Lake how much cotton they had on hand and I would find it short and notify Mr. Bragg who issued all the bills of lading.

Q. You found out that Faulkner's cotton was not Alphin & Lake's cotton?

A. Yes sir, when they failed.

Q. Were you not continually urging the Compress Company to load the cotton on Iron Mountain cars?

A. Yes sir.

Q. That compress was the place you expected the cotton to be supplied to meet the Iron Mountain bills of lading?

A. Yes sir.

Q. The compress cotton was the cotton you expected to meet the bills of lading?

A. Yes sir.

Q. In making out your book from which and about which you testified yesterday from what did you make it?

A. The way bills.

Q. Have you got the way bills?

A. I have not, the Arkansas Southern has them.

Q. Why did you present the freight bills to Alphin & Lake?

A. Mr. Lake told me the first of the season to draw on him through the bank for all the freight. The cotton was billed,

108 Notify Alphin & Lake.

Q. You drew on them for all the freight?

A. Yes sir.

Q. You understood from that it was his cotton?

A. I supposed it to be.

Q. Don't you know he would not pay the freight on anybody else's cotton?

A. It did not look reasonable.

Q. Is it not a fact that the freight followed the cotton right along, you would follow it right along with freight bills?

A. I collected every Monday.

Q. For the specific cotton?

A. Yes sir.

Q. The freight is usually paid by the owner of the cotton is it not?

Objected to by defense, objection sustained and plaintiff excepts.

Q. You do state that the Arkansas Southern had no room or space for the delivery of cotton except the Compress?

A. We have no cotton platform here at all.

Redirect examination:

Q. I understood a while ago when your were questioned as to your testimony in the bankruptcy proceedings of the Alphin-Lake Cotton Co. you stated then that the Arkansas Southern Railroad Co. had no way bills?

A. I meant that I turned them over to the officials of the Arkansas Southern and did not have them in my possession.

Q. At the time that cotton came in over the Arkansas Southern to El Dorado you had the way bills before you?

A. Yes sir, the way bills came in with the cotton.

Q. What proceeding was that before which you gave this testimony about which you have been examined?

109 A. I think the bankrupt case of the Alphin-Lake Cotton Co.

Q. What particular matter were the attorneys questioning you about?

A. For the shipments out of cotton the number of bales they had

shipped out and the amount of freight they had paid in I think were about the only two things.

Q. Who was present at that examination, what parties?

A. Mr. Smith and Mr. Fletcher and Mr. House.

Q. It was taken before A. H. Sevier?

A. Yes sir.

Q. Explain to the jury what you meant in each of your answers when you said the cotton was billed to the Alphin-Lake Cotton Co.

A. The way bill we received was billed care of the Compress, notify Alphin-Lake Cotton Co.

Q. What you meant was that they were the parties named in the way bill to be notified?

A. Yes sir.

Q. What do you mean by that answer: "Q. Was not it all billed to Alphin & Lake that went in there? A. Yes sir?"

A. The cotton was billed care of the Compress Company, notify Alphin-Lake Cotton Co.

Q. Why did you make that statement, what do you mean by this answer: "Q. Was it not all billed to Alphin & Lake that went in there? A. I understood it was billed that way." What do you mean by being billed?

A. The way bills I received.

Q. What did the way bills say?

A. Care of the Compress, Notify Alphin-Lake Cotton Co.

Q. You stated you noticed at times there were bills of lading issued by Mr. Bragg, who as I understand was an agent of the Iron Mountain road who lived in Little Rock?

110 A. Yes sir he was Division Freight Agent.

Q. He lived at Little Rock.

A. Yes sir.

Q. You say at times you noticed that he had issued bills of lading for more cotton than you thought Alphin Lake Cotton Co. had on hand?

A. Yes sir.

Q. You stated I believe that you so advised Mr. Bragg by letter?

A. I think I always telegraphed him.

Q. That there was not sufficient cotton here to fill those bills of lading?

A. Yes sir.

Q. From your testimony I judge that Mr. Bragg did not require cotton to be loaded or to be in possession of the Iron Mountain when he issued bills of lading, is that true?

A. I do not know what Mr. Bragg's ruling was, he always took up compress receipts when he consigned cotton, I know that. I do not know, I do not believe I can answer that question.

Q. Counsel asked you if you did not state in that examination before Maj. Sevier, this: "And went in there (meaning cotton that went into the compress) to their account" and you were asked if you did not answer: "Yes, I suppose so" do you remember making that answer to that question?

A. No sir, I do not remember.

Q. You do not remember the question to have been asked and you do not remember answering it?

A. No sir.

Q. If that question was asked and that answer was made by you what impression did that make on your mind?

Objected to by plaintiff, objection sustained by the court and defense excepts.

Q. What meaning did you intend by that answer?

111 Objected to by plaintiff, objection sustained by the court and defendant excepts.

Q. You say that at the time this cotton was being delivered to the Compress Company the Iron Mountain issued bills of lading in excess of all cotton there, and you counted the cotton, and about that, did you ever ascertain there was not enough cotton there to satisfy the bills of lading outstanding of the Arkansas Southern R. R.?

A. No sir, I never counted the cotton to see that. I had two thousand bills of lading on hand signed by the Iron Mountain and if I did not have that much cotton I would notify Mr. Bragg.

Q. Was there any time as far as you know when you did not have enough cotton to satisfy the outstanding bills of lading of the Arkansas Southern?

A. There was always enough on hand for that.

Q. Mr. Fletcher asked, after you found out they were issuing too many bills of lading, if you continued to deliver cotton to the Compress Company and you said you did?

A. Yes sir.

Q Did the cotton continue to come consigned to the Compress?

A. Yes sir.

A. Lake shipped in all the cotton shipped in here last year over the Arkansas Southern?

A. Yes sir.

Q. There was no one else shipping in here over it?

A. I think not.

Q. All that came over the Arkansas Southern he had an interest in it?

A. Yes sir and he told me to draw on him for the freight bills and he would pay them.

Q. At this investigation in which you testified was there any representative of the Arkansas Southern present?

A. No sir.

112 Q. Was any representative of the road connected with it?

A. No sir I think not.

Q. That investigation was carried on by these men representing these banks &c.

A. Yes sir.

Q. At that examination were you asked the question: "Did you require the surrender of the bills of lading before doing that?" and did you answer "No?"

A. Yes sir, I think I did.

Q. Were you asked this question: "Why not" and did you answer: "Because Mr. Lake had sent them down to me very promptly and I supposed the Compress Company was responsible for the cotton?"

A. Yes sir.

(Objected to by plaintiff, objection sustained by the Court and defense excepts.)

Q. Was not this question asked you during the same examination, and all made in the same examination: "How are you able to know if you did that whether they held that cotton there or whether they shipped it out under new bills of lading received by you? A. I supposed they always had enough cotton there to cover it." Was that part of your testimony?

A. Yes sir, I think it was, I do not remember just the wording of it.

Q. Was there ever any time that you know of when there was not enough cotton in the compress to meet all the bills of lading outstanding of the Arkansas Southern?

A. There was always enough cotton that Lake said was his cotton to meet them.

Q. Did you all the time believe there was enough there to meet the Arkansas Southern Bills of lading?

A. Yes sir.

Q. And you believe now if the cotton which was there and which Lake said was his that there was enough?

113 A. Yes sir.

Cross-examination:

Q. Is it not true that the cotton that came over the Arkansas Southern and was delivered to the Compress, that it was delivered under the compress shed for the purpose of compressing?

A. I- was unloaded on the Compress platform.

Q. It was not unloaded on Faulkner's platform?

A. The switch holds about ten cars and half of it is Faulkner's and half the Compress.

Q. Is it not true that the cotton was unloaded into the compress for the purpose of compressing?

A. Yes sir.

Q. Did not the compress frequently catch up with the cotton they had for compression, and there would be days and days they would not compress?

A. As fast as they cleaned up in the compress they would move more in from Faulkner's platform.

Q. You delivered nearly all of this cotton into the Compress?

A. Yes sir.

Q. Was it not only in rare instances when the cotton was unloaded off of the Arkansas Southern cars they were unloaded on Faulkner's platform?

A. No sir, I suppose half of it, the Compress used both platforms and used the platform all the way back for unloading.

Q. The compress would frequently catch up with cotton on the Compress platform and under the shed?

A. Yes sir, they would be up with it today and begin moving it in tomorrow.

Q. Were there not weeks at a time the Press was not operating?

A. Yes sir.

Q. At that time is it not true there was none of the Arkansas Southern cotton on the platform? Faulkner's platform?

114 A. I could not say.

Q. Judge Hemingway asked if you did not make this statement at that examination referred to: "How are you able to know if you did that whether they held that cotton there or whether they shipped it out under new bills of lading they obtained from you" and you answered "I suppose they always had enough cotton on hand to protect any shipments made" and did you not also answer to this question, "Is it not a fact under that system they could take cotton you delivered to the Compress and load it out the next day under bills of lading you and Mr. Bragg issued? A. Yes. Q. And when the bills of lading were examined that particular cotton would not be in the compress? and you answered, yes, they could have done that?

Objected to by defense and the court says it is proper to ask whether or not it is a fact, to which defendant excepted.

Q. Is it not a fact that under the system of delivery of cotton into the Compress the cotton you delivered in there one day could be delivered out the next day, say to the Iron Mountain for further shipment?

A. Yes sir.

Q. Is it not a fact that you were after the compress people continually to load compress cotton under bills of lading you held there?

A. Yes sir.

Q. And they were loading as fast as they could the cotton that was compressed?

A. Yes sir.

Q. Was not this cotton from the Arkansas Southern put in there for compression?

A. I suppose so.

Q. They compressed it as fast as it went in there?

A. I could not say.

Q. You permitted cotton from the Arkansas Southern to go in there without the surrender of the bills of lading?

A. Yes sir.

Q. As soon as that was compressed you were urging them

115 to load it out under bills of lading issued by the Iron Mountain?

A. I was urging them for out shipments.

Q. You were urging them to ship it out under bills of lading that had been obtained from the Iron Mountain?

A. Yes sir.

Q. Were you not doing that because there were a great many more bills of lading outstanding than there was compressed cotton on hand?

A. They would run a day and hardly ever pressed over five or six hundred bales a day, and there were outstanding bills for more than the compressed cotton all the time.

Q. When you made the statement that you supposed there was enough to meet the bills of the Arkansas Southern, you had reference to all the cotton on their platform and Faulkner's?

A. Yes sir.

Q. You did that without inquiring from Faulkner whether the other people owned that cotton?

A. I took Lake's word for it.

Q. Do you not know that Sample & Co. of El Dorado were very large buyers and shippers of cotton?

A. No sir, they are very small shippers.

Q. You knew they were large purchasers?

A. They were large merchants but did not ship much cotton.

Q. Did you know they were large purchasers of cotton?

A. No sir, I did not.

Q. When you became uneasy at different times and went to see how much cotton was on hand and count it, did you not approximate all the cotton in the Compress and on Faulkner's platform?

A. Yes sir.

Q. And you included in that a great deal of local cotton?

A. I included all the cotton Lake said was his.

116 Q. The Arkansas Southern shipments by no means comprised all the cotton on that platform?

A. No sir.

Q. You knew the cotton that came off of the Arkansas Southern was delivered into the Compress and they were compressing it as fast as they could?

A. Yes sir.

Q. When you counted or estimated the cotton did you see if there was enough to fill these outstanding bills of lading, you knew there were bills outstanding that had not been surrendered?

A. Yes sir, but I did not know there were as many as there were because I kinder lost track of them.

Q. I understand this book here is the book you had the compress to receipt on for the cotton delivered to the Compress?

A. Yes sir.

Q. It covers all the cotton that came off of the Arkansas Southern that was delivered into the compress for the cotton season up to the time the compress quit business?

A. You can see the date on the back of the book, it commences September 9th, and goes to the failure of Alphin & Lake.

Q. You got your information to make out this book from the way bills?

A. Yes sir.

Q You followed the way bills in making it out?
A. Yes sir.
Q. Who kept this book?
A. In my office and at the Compress?
Q. Who made this out?
A. My bill clerk, the most of it.
Q. Was this book ever changed in any way?
A. I have never seen it since it left here.

Q. You have had it in consultation with the Attorneys
117 of the road and the Auditor?

A. Yes sir, I think we had it here one time.
Q. Examine it and state if there have been any changes in it?
A. There is something here that I do not know how it got here.
Q. What is that?
A. Come here and I will show you better than I can tell you.
Q. You do not know how Shipper's Order was put opposite these first cars?
A. No sir.
Q. Look through where you find shipper's order written opposite these cars and state if it does not appear to be written in a different handwriting and a lighter writing and with a lighter pencil than the original memoranda made in the book?
A. Yes sir.
Q. Do you know who did that?
A. No sir, in the places where I wrote up I may possibly have done that.
Q. If you did that what did you check it from?
A. From the way bill.
Q. If you put shipper's order on there you took it from the way bill?
A. Yes sir.
Q. But those you refer to as having been put in there since the original memoranda was entered, was it on there at the time Wright signed for the cotton?
A. I could not say.
Q. You think it was not there?
A. I do not know.
Q. Examine these way bills and see if they are the way bills from which you got your information to make out this receipt book?
A. Yes sir.

118 Q. Will you introduce as a part of your evidence the way bills of the cotton called for by these bills of lading?

A copy of one of the way bills introduced in evidence is set out after the testimony of this witness; all other ways bills are exactly the same except as to the dates, descriptions of property car numbers, and except the Junction City bills show consignments from Alphin-Lake Cotton Co. to Alphin & Lake Cotton Co.

A. Yes sir.
Q. You have identified this book I believe?
A. Yes sir.

An exact copy of one page from the cotton book is set out after the testimony of this witness; all other pages are exactly the same except as to dates, descriptions and car numbers. The bill and page set out fully show the contents of the others so far as pertinent or material in this cause.

Book in which Compress Company receipted for cotton is here introduced in evidence.

Redirect examination:

—. You say that in this book "Shipper's Order" does not appear to have been written by you?

A. It looks like my writing all the way through and I will not say I did not do it.

Q. Is this your writing?

A. No sir.

Q. Is that?

A. Yes sir. I may have put that in there, I can't say whether or not I did.

Q. You mean you may have put "shipper's order" in?

A. Yes sir.

Q. I believe you stated when Mr. Smith asked you about your knowing the cotton was put in the compress to be compressed,
119 all the cotton that was put in there was compressed was it not?

A. Yes sir.

Q. Did you know when the cotton was put in the press just what day it was going to be pressed?

A. No sir.

Q. You did not know whether it would be that day or ten days later?

A. No sir.

Q. Did you look up your books last night to see about these two cars of cotton?

A. Yes sir.

Q. Can you testify when they were received?

A. Car No. 221 A. S., November 28th. was unloaded at the Compress December 5th.

Q. Do you know what date it got to El Dorado?

A. It was received December 2nd, and unloaded at the Compress December 5th.

Q. When you testified yesterday about the dates when these different shipments were received, did you mean that they were received at El Dorado on the dates testified to by you or unloaded at the Compress?

A. Unloaded at the Compress.

Q. When was the other one delivered?

A. No. 243 A. S. was delivered at Compress December 6th.

Defendant here closes.

120

When the Rates charged for transportation are less than Tariff, the number of Special authorizing such Rate must be stated in this Way-Bill.

1-1901—10 M-C.

The Arkansas Southern R. R. Co.

Cotton Way Bill.

From Bernice, La., Station, to El Dorado, 12/8, 1902, via ——.

W. B. No. 46.

Car No. 249.

Whose car, A. S.

Consignor.	Consignee and destination.	Bill of lading.			No. bales forwarded on this W. B.	Marks and tag Nos.	Weight.	Rate.	Freight.	Charges.	Prepaid.	Total to pay.	Prepaid beyond.
		No. bales signed for.	Date of B. L.	Number of B. L.									
B. of B.....	Notify Alphin Lake Cotton Co. c/o Compress.....	74	12/8	131	25	3995—5305 3658—3870 4904—3843 4868—4862 4878—4860 3969—5441	5362 3862 4879 4022 4671 5466	3940 4027 4593 4023 5383 4941					
		25	.....	.....	.....	3869— S L & O	12500	1 50	37 50	.....	.....	37 50	

25
12 50

#6 12/8

DIXON.

121

11 / 25.

202	A. S.....	S / O.....	O. K. 11 / 26
24	B / C.....	Bernice.....	Wright
249	A. S.....	.....	O. K. 11 / 26
24	B. / C.....	Dubach.....	Wright
		11 / 26.	
230	A. S.....	.....	O. K. 11 / 27
24	Bren.....	Dubach.....	Wright
247	A. S.....	.....	O. K. 11 / 27
24	Brbs.....	Dubach.....	Wright.
228	A. S.....	.....	O. K, 11 / 27
23	Brbs.....	Dubach.....	Wright
*[218]	[A. S.]*.....	[S. O]*.....	[O. K. 11 / 27]*
*[23]	[Brbs]*.....	[Dubach]*.....	[Wright.]*
218	A. S.	S. / O.....	O. K. 11 / 28
24	B. / C.....	Bernice.....	Wright.
235	A. S.....	S. / O.....	O. K. 11 / 27
25	B. C.....	Bernice.....	Wright.
241	A. S.....	S. / O.....	O. K. 11 / 28
25	B. C.....	Bernice.....	Wright.
244	A. S.....	S. / O.....	O. K. 11 / 27
24	B. / C.....	Bernice.....	Wright.
225	A. S.....	S. / O.....	O. K. 11 / 28
25	B. / C.....	Bernice.....	Wright.

122 Plaintiff on rebuttal, introduced the deposition of J. P. Wright, and read same to the jury as follows:

Testimony of J. P. Wright, Rebuttal.

J. P. WRIGHT, being duly sworn, deposes and says:

Q. Were you engaged at the Compress Company in El Dorado during the months of Novemner and December last?

A. Yes.

Q. In what capacity?

A. Assistant manager.

Q. What did you have to do with the receipt of cotton delivered to the compress company by the Arkansas Southern Railroad Company?

A. My position was to boss the hands, and see that the cotton was unloaded as speedily as possible.

Q. For whose account was the cotton delivered to the compress company by the Arkansas Southern Railroad Company? I mean the cotton that was consigned to the care of the compress company?

A. Alphin & Lake Cotton Co. were the only shippers who localed their cotton into that point.

Q. What do you mean by "localed" in your answer?

A. I mean that the cotton was sent there for concentration and working up.

[*Words and figures enclosed in brackets erased in copy.]

Q. Did you receive any cotton from the railroad company at the compress company for the account of any one else than the Alphin & Lake Cotton Co.

(Objected to because the witness has not intimated that any cotton was ever received there on account of Alphin & Lake Cotton Co.)

A. I think my other answer covers that. They were the only people who shipped cotton to that point.

Q. For whose account did all the cotton delivered at the compress company by the Arkansas Southern Railroad Company go?

A. For the Alphin & Lake Cotton Co.

123 Q. What instructions if any did you receive from the Arkansas Southern Railroad Company or its agents in reference to the person for whose account the cotton delivered to the compress by the Arkansas Southern Railroad Company was to be held?

Q. I received no instructions regarding the cotton that was put in the side track. It was always supposed to belong to the Alphin & Lake Cotton Co. and was to be unloaded at once.

(Cross-examination:)

Q. You say you received no instructions from the Arkansas Southern Railroad Company as to whose account the cotton went to.

A. No. It was always supposed to be Alphin & Lake's.

Q. Who supposed it was Alphin & Lake's?

A. Both they and myself, or else *he* would not put it in there.

Q. Wasn't it consigned to the care of the Compress Company?

A. I suppose so. I had nothing to do with these bills of lading. We had a yard book, which they hold now, and I merely counted the cotton and O. K-. the book as to the number of bales.

Q. Didn't the book show whenever the cotton was shipped Shipper's Order, that was the case; show the name of the consignor and consignee and the number of the car and the number of the bill of lading.

A. No.

Q. The book that you O. K-. didn't show any of that.

A. If it did I don't remember ever seeing it in there.

Q. Suppose that the book is introduced, with your signature, showing the name of the consignor, the name of the consignee, whether the consignment is shipper's order or straight, and the number of the car and the number of the bill of lading, then you are mistaken about not having signed a book of that sort.

A. I remember signing a little book and all that, yet, at the same time, I don't remember shipper's order being in it at all.

124 As well as I remember it, only the initial car number and place where the cotton originated.

Q. Didn't you have that book at the compress to assist you in straightening out your cotton, keeping a run of the cotton, frequently.

A. I had nothing further to do with it after I O. K-. it in the car. Mr. Turrentine worked it up, classified it and cut it up.

Q. It was at the compress for that purpose?

A. It went back when we "O. K-." it to the railroad people.

Q. What did Turrentine have it at the Compress for?

A. He had it to issue compress receipts by.

Q. Didn't you have it so that you could deliver the cotton to the person entitled to it?

A. It didn't have any names upon it there, as well as I remember.

Q. It didn't have the name of the consignee at all?

A. That little book didn't. I don't think. I noticed just the initial car number and the point of shipment.

Q. It didn't have the shipper's order.

A. If it did I don't remember seeing it.

Q. Where do you live now?

A. I haven't any position. I am going back to Memphis and make that my home. I guess I will go tomorow night.

Q. Were you here some weeks ago?

A. Yes.

Q. Did you have a talk with Mr. Fletcher, the attorney for the bank in this case, about this case at that time?

A. No.

Q. How did you happen to come here today?

A. I had a letter written me at Hazlehurst, Miss., from Mr. Fletcher stating that he would like to have my evidence in this case, and that letter was forwarded to me at Memphis. I called him up over the 'phone at his expense and told him if he would pay my expenses over here I would come over here and give my testimony.

Q. Why didn't you offer to go to the trial at El Dorado next Wednesday and give your testimony?

A. That would put me to a whole lot of trouble, time etc. I am yet willing to go if it becomes necessary.

Q. What became of the cotton that was shipped over the Arkansas Southern road to El Dorado and delivered to the compress company?

A. I don't know about that. The class book will show. It went into different classes and marks, through different grades.

Q. I am not asking what marks it went into, but what became of the cotton.

A. When it was marked up and compressed it was loaded out.

Q. Who was it loaded out to?

A. The people who owned the cotton I suppose; Alphin & Lake Cotton Co.

Q. The Alphin & Lake Cotton Co. got all the cotton that was delivered there.

Q. From off the Arkansas Southern? Yes.

Q. That's what I am asking about. All the cotton that the Arkansas Southern brought there billed care the compress company was delivered to the compress.

A. Yes I suppose so.

Q. And all the cotton that was delivered to the compress was shipped out by Alphin & Lake Cotton Co.

A. So far as I know, it was.

Q. You were the manager there, as I understand?

A. I was assistant manager.

Q. Who was the manager?

A. Mr. Swayne was there and helped me for about four months.

Q. He helped you?

126 A. Yes.

Q. Who was the manager if you were assistant manager? Was he manager?

A. Really didn't have any manager.

Q. You was the head if you was assistant manager, and there was no manager. You were both assistant managers.

A. Yes.

Q. Your principal wasn't present?

A. No.

Q. You say that the Railroad Company never gave you any directions as to whose account that cotton was delivered on?

A. They had been shipping cotton that way for three years and he never said anything to me about it while I was down there; except on one or two occasions, he said something about some of those shipper's order bills of lading and told me to call Mr. Lake up about it. I knew nothing about it, and had nothing to do with it.

(Redirect examination:)

Q. When he spoke to you about the shipper's order bills of lading, would that be before or after the cotton went into the compress.

A. The cotton would be in the yard. I asked if he had any cotton on the yard for us, and he said there was some cotton in the yard, that he wired Mr. Lake to send the bills of lading.

Q. Those he wanted the bills of lading surrendered before it went into the compress. (Objected to as, being entirely a statement of conclusion.) Why did Mr. Hutchinson want the bills of lading?

A. I don't know anything about that. Mr. Lake can explain that.

Q. The cotton was in the yard and had been unloaded from the cars at that time.

127 A. What cotton do you refer to?

Q. For which he wanted bills of lading sent down by Mr. Lake?

A. In the Railroad yard. It had not been kicked into the press.

Q. Did he ever say anything to you about the bills of lading for any cotton that was delivered in on the press switch to be unloaded into the press?

A. No.

Q. Were any of the way bills ever shown to you or delivered to you when cotton was delivered into the press?

A. No. That little book was used instead of that?

Q. That little book was all you had?

A. Yes; we kept that between us as a matter of convenience.

Q. You spoke something about Turrentine having that book. Did you ever see him with it?

A. He used it in checking up his compress receipts.

Q. Did you ever see anything showing that the cotton was shipped to the care of the compress company?

A. What do you mean?

Q. Cotton way bills or bills of lading?

A. No, I never saw the way bills.

Q. Did you see the bills of lading?

A. He would sometimes send them to Turrentine and sometimes send them to me and sometimes to Mr. Hutchinson.

Q. Were any instructions ever given to you by Mr. Hutchinson to take up the bills of lading before shipping out the cotton?

A. No. Those things should really have gone direct to Mr. Hutchinson and not to me.

Q. Did Mr. Hutchinson ever make any request of you about bills of lading other than those you have just mentioned?

128 A. No. It was a request, if he made any, to Mr. Lake.

NOTE: The foregoing deposition of J. P. Wright was taken at the law office of Ratcliffe & Fletcher, in the city of Little Rock, Arkansas, on the 28th day of March 1903, before Noel Loeb Notary Public.

129 Plaintiff here introduced the deposition of C. T. Walker taken on part of plaintiff, and read same to the jury on rebuttal as follows:

Testimony of C. T. Walker.

C. T. WALKER being duly sworn, deposes and says:

Q. State your name, residence and occupation.

A. C. T. Walker, residence Little Rock, Ark., occupation, at present an employee of the Little Rock Trust Co.?

Q. What was your business in December of last year, and how long had you been in that position?

A. I was secretary and treasurer of the Little Rock Trust Co. and cashier of the Bank of Little Rock, and have been in that position I think since 1899. About four years.

Q. The German National Bank has brought suit on a number of bills of lading for cotton, consigned by the Bank of Bernice, and most or all of it to shipper's order, which bills of lading have the endorsement of the Bank of Bernice and also of the Bank of Little Rock. Please state how the Bank of Little Rock was connected with the transfer of those bills of lading to the German National Bank.

A. We had nothing to do with the transfer. We delivered them to Mr. Lake. He would bring us the money on them.

Q. You delivered them to Lake to be sold.

A. Yes.

Q. He took them out and sold them, and brought you your money?

A. I suppose you would call it "selling." I didn't know at the time.

Q. They were sold or hypothecated?

A. Yes.

Q. The Bank of Little Rock had nothing to do with the raising of the money, whether by sale or hypothecation?

A. Nothing at all.

Q. Mr. Lake applied to you for the bills, and you let him have them?

130 A. I told him he must reduce his account the day before, and I spoke to him, as I remember now, over the telephone that morning, that he must attend to the matter. He said he would be down here and see me in a short while, and directly afterwards he came in, in probably an hour or such a matter. He said if I would let him have bills of lading for so many bales of cotton, he would bring me the money upon them, I believe, if I recollect at $36.00 a bale or something like that. I asked Mr. Johnson about what basis the drafts we had been getting in here on bills of lading were drawn at, that is, about how much per bale, and found that would cover about the values we had paid on the cotton; took some bills of lading at a little more and some a little less.

Q. You mean cotton generally not this particular cotton.

A. No not that particular cotton, but generally. We just wanted to keep the average security about the same as the margin to us, unchanged I agreed to do it. I agreed to let him have the bills of lading.

Q. He brought back the money. What became of the money brought back? How was it applied?

A. To his credit. To the credit of Alphin & Lake Cotton Co.

Q. Their general credit?

A. Yes; credited upon their overdraft. Nearly all the cotton accounts in the city banks are carried in the form of overchecks. The banks get a little more interest on that, but it is about the same as discounting paper at 8%.

Q. Mr. Fuller, the cashier of the Bank of Bernice, testified that he sent bills of lading for 558 bales at one time and 327 bales at another attached to drafts. Can you look to the correspondence and find the letters in which bills of lading were sent attached to drafts?

A. I don't know whether I can tell from the letters. For instance, we would get some two or three letters from him in

131 the day with drafts in each letter and bills of lading attached. Maybe there would be a date apart in the date down there. Unless they are mailed about midday—we don't get them the next morning. If mailed later in the evening it comes a day later to us.

Q. Do those letters all contain these words "we enclose for collection and credit items as stated below."

A. They seem to, all of them.

Q. Where the letters show that drafts are enclosed with bills of lading attached, do they not also request that the bills be delivered upon payment of the draft?

A. Not always.

Q. Turn to the letters that show enclosures of drafts and just read me what you find in reference to it.

Q. Here is one with two drafts of November 7th, one for $1989.05, and one for $2471.66.

Q. What direction is given as to the bills of lading?

A. None whatever.

Q. Does it refer to bills of lading at all?

A. No.

Q. Then it does not show that any bills were attached.
A. The letter does not show.
Q. Go to the letters that show bills of lading are attached to drafts, and read what directions are given, first giving the date of the letter and then the specific directions as to the bills of lading.
A. There is a draft for $2000 on Alphin & Lake Cotton Co., and the letter says "for delivery documents upon payment of draft. Allow grace if asked." Drawn on the bank form, probably a demand draft. That's the reason why it states that about grace. They frequently sent them out that way.
Q. That applies to draft No. 112, does it not?
A. Yes.
Q. That's what date?
132 A. Nov. 22nd.
Q. That reads, does it not, "112," meaning the number of the draft, "Alphin & Lake Cotton Co., no protest, $2000, for delivery documents upon payment of draft. Allow grace if asked."
A. Yes. Here is a letter of December 3rd. containing two drafts on Alphin & Lake Cotton Co., one with no number, for $4622.68, and one numbered 115, marked "no protest," for $4000. It says "Bills of lading enclosed to be delivered upon payment of theirs enclosed and our remittance of the 29th. of November and the 1st. and 2nd. of December." Letter of December 8th., draft on Alphin & Lake Cotton Co. for $2801.69. It says "Deliver bill of lading upon payment of draft." There is no number upon that draft.
Letter of December 10th. with instructions reading as follows evidently enclosing some bills of lading; "Please deliver enclosed bills of lading upon payment of Alphin & Lake Cotton Company's unpaid drafts you hold including those maturing the 11th."
Letter of December 19th., "We enclose bill of lading for 26 bales and 74 bales, to be attached and made part of our number 49, $3978.00."
Q. Have you any means of telling when the remittance of November 29th. and December 1st. and 2nd. was paid?
A. $5155.51 credited to them on the 3rd. of December, and also $5150.93.
Q. Those are the drafts of December 1st. and November 29th., which are referred to in his letter of December 3rd.
A. Yes. Credited on the 9th. of December $2801.69, the enclosure of the 2nd.
Q. Then the remittances of the 29th., of November and the 1st. of December were credited to the Alphin & Lake Cotton Co. on the 3rd?
A. The remittance of November 29th. was credited to the Bank of Bernice on December 3rd. The item of December 1st. was credited on the 3rd. also. The item in their letter of the 2nd. was
133 credited on the 9th. of December which is the $2801.69 item; as shown upon the book.
Q. When were the items of $4622.68 and $4000 which were enclosed in the letter of December 3rd, credited to Alphin & Lake Cotton Company.

A. On the 9th. of December.

Q. What was Mr. Celsus Perrie doing in November and December 1902?

A. He was, I think, secretary and treasurer of Alphin & Lake Cotton Co.

Q. Did you authorize him to deliver any of these bills of lading for the Bank of Little Rock to the German National Bank.

A. No.

Q. Did you authorize him to collect from the Bank any money for you on these bills of lading?

A. No.

Q. You understand when I say "you" I mean the Bank of Little Rock.

A. Yes.

(Cross examination:)

Q. I understood you to say that you allowed Mr. Lake to take the bills of lading and deliver them to the German National Bank with the understanding that he would bring to you the money that he received from the bank upon the bills of lading.

A. Yes. I didn't know what bank he was going to. I supposed he was going to get it at some bank, but he didn't tell me where.

Q. It was your expectation that he would either return to you the money or the bills of lading.

A. Yes. He told me he would bring the money back or the bills of lading in a few minutes.

Q. That was your expectation.

A. Yes.

134 Q. You simply allowed him to take them out for that purpose?

A. Yes.

Q. Don't you remember that Mr. Perrie was with him when he took out the last batch on December 11th?

A. No. He may have been in here, but Mr. Lake was talking to me about it back here at my desk. If he was in the bank, I don't know. I think Mr. Perrie came back with him when he brought the money back.

Q. What did he bring back on that occasion?

A. I find by looking at the deposit slip $4200 in currency, $5000 in gold, and $10,000 in exchange.

Q. Is it not a fact that the bills of lading that were transferred to the German National Bank December 6th. had a draft of Alphin & Lake Cotton Co. attached to them in favor of the Bank of Little Rock for $17,856.00 and it was collected by the Bank in that way and the bills of lading delivered?

A. I don't remember exactly how it was. It may have been though.

Q. The Bank of Little Rock got the proceeds of all the bills of lading.

A. Yes.

Q. You would not have delivered the bills of lading to Lake except

on the understanding that he would return the bills of lading or the money that he might raise upon them.

A. Certainly not.

Q. When you speak of the time at which the various drafts with bills of lading attached were credited to Lake, does that necessarily follow that they were paid on that date? or that they were simply credited on that date?

A. Credited to the Bank of Bernice you mean? We didn't credit them until those drafts were paid.

Q. Have you those drafts now?

A. No, they were delivered to Mr. Lake. We kept the bills
135 of lading and gave him the drafts.

Q. Why did you not deliver up the bills of lading when the drafts were paid?

A. Because he checked upon us and we kept the bills of lading as security.

—. Then the Bank of Little Rock held the bills of lading as security for the drafts that had been paid.

A. Yes.

Q. Is it not a fact that they held bills of lading for all that Lake owed them?

A. Yes.

Q. On December 6th what was the amount of Lake's overdraft to the bank?

(Objected to as incompetent, irrelevant and immaterial.)

A. $139,658.50.

Q. December 11th, what was the amount of his overdraft.

(Objected to as incompetent, irrelavent and immaterial.)

A. $143,531.97.

Q. That overdraft had been running for some time prior to the dates given?

A. Yes.

(Redirect examination:)

Q. What does the notation "December 11th, 1902," in the corner of this letter of the 10th indicate?

A. The date it was received by us.

Q. What time of day was it received, or could you state?

A. It came here in the morning to us. It is customary to receive mail off of that line in the first morning's mail. Our janitor generally had our mail here when we got down that came through the night, and at 9 o'clock he would go to the post office again, and
we got the mail that came by Pine Bluff, St. Louis and
136 from the east in that delivery, but this mail, we would get that early in the morning.

Q. Can you tell how much the unpaid drafts of the Bank of Bernice on December 11th amounted to?

A. No.

Q. As I understand from what you have stated to Mr. Fletcher, these bills of lading from the Bank of Bernice came there without

any drafts attached or with drafts attached to be surrendered to Alphin & Lake Cotton Co. when the drafts were paid. When the drafts were paid the Alphin & Lake Cotton Co. left the bills of lading with your bank?

A. Yes. In other words, it was on the strength of the bills of lading that we took his check for his drafts.

Q. He paid the drafts by check upon you.

A. Yes.

Q. Then he left the bills of lading as security for his account?

A. Yes.

Q. Then at the time that these bills of lading were taken to the German National Bank, there was nothing due on the drafts to the Bank of Bernice, but they had been paid, and the bills of lading detached and left with you.

A. Yes.

Q. Is it not a fact that Mr. Lake frequently brought here compress receipts for the cotton and took bills of lading from you in order that they might be surrendered to the railroad company?

A. No. He would come and get the bills of lading from us, and give his due bills for them, and send to El Dorado for delivery to the Railroad and have compress receipts returned for the same.

Q. Did the Bank of Little Rock have any agent at El Dorado to receive, make demand for, or look after the cotton covered by the bills of lading that you held?

A. No.

137 Q. Did you ever make any demand for any cotton of the railroad company at El Dorado?

A. I wrote to the agent at El Dorado twice, and called his attention to the fact that we had bills of lading that appeared to us unduly old, and asked if he had delivered up the cotton on them.

Q. When was that?

A. One inquiry was on the 12th of December. I omitted to date the other one.

Q. What was the inquiry? Have you a copy of the letter?

A. Yes, in the impression book. He wired us that it had all been delivered.

Q. There was another letter written previous to *the* one, and similar to it.

A. Yes.

(Mr. Fletcher objects to the testimony about the correspondence, not on the ground that the copies introduced are not the best evidence, but on the ground of irrelevancy and immateriality.)

(A copy of said letter is hereto attached, made a part hereof, and marked Exhibit "A.")

(Recross-examination:)

Q. Prior to the time these bills of lading came into your hands, had you not been urging Mr. Lake for additional collateral?

A. I had been urging him to reduce his account, that it was more than we wanted to carry.

Q. Wasn't it understood you were to hold all the bills of lading for overdrafts.

A. Yes.

(Redirect examination:)

Q. Do you remember whether the other letter was earlier or later than this one?

A. I am quite sure that it was earlier, because it had reference to shipments in September and October, and this has reference
138 to items in December.

Q. In reply to the former inquiry, were you told that the cotton had been delivered to the compress company?

A. Yes.

NOTE.—The foregoing deposition of C. T. Walker was taken at the Bank of Little Rock, in the City of Little Rock, on the 25th day of March, 1903, before Noel Loeb, a Notary Public.

139 EXHIBIT A.

DECEMBER 12TH, 1902.

Agent Ark. So. R. R. Co., El Dorado.

DEAR SIR Enclosed is a list of car shipments of cotton from Junction City and Dubach to El Dorado for account Alphin & Lake Cotton Co. from December 2nd. to 8th.

Please examine on receipt of this and wire us promptly at our expense what consignments on this list have been received at El Dorado and delivered to the Compress Company.

You can designate particular shipments by numbers in ( ) marked at foot by X. If all have been received and delivered, it is only necessary to say "all have been received and delivered."

We are anxious to know this as soon as possible, and hope you will wire us on the 13th. and oblige.

Yours truly,

C. T. WALKER.

Date of B/L.	Shipped from—	Consignee.	Marks.	No. bales.	
Dec. 2/02	Junction City.....	A. & L....	S. L. C....	24	A. S. 228
"	" "	"	"	23	A. S. 214
"	" "	"	"	24	A. S. 245
Dec. 3rd	" "	"	"	13	A. S. 249
" "	Dubach	"	T	..	A. S. 122
" 4th	"	"	"	22	
" 6th	"	"	"	13	
" "	"	"	S. L. C....	18	
" 8th	J. C.....	"	"	34	
" "	"	....."....	..."....	24	A. S. 242
	"	...."....	.....	24	A. S. 244
				24	M. K. T. 11683

140 *Testimony of E. H. Lake.*

E. H. LAKE, a witness for the plaintiff, on rebuttal testified:

Q. Mr. Lake I show you two bills of lading from Junction City in this case, where did you first see them?

A. In the Bank of Little Rock.

Q. Did the Bank of Little Rock have them in its possession when you first saw them?

Objected to by defense, objection overruled by the court and defendant excepts.

A. Yes sir, they did. To the best of my knowledge they had it.

Q. Did you see them before you got them from the Bank of Little Rock?

A. No sir, not that I know of.

Q. How was the cotton for which these bills of lading were issued paid for?

A. By the Bank of Little Rock.

Q. How was all the cotton shipped from Bernice and Junction City to El Dorado paid for?

A. By the Bank of Little Rock.

Cross-examination:

Q. When did you first see that bill of lading?

A. I do not know the exact date, they were coming in all the time.

Q. What impresses you that you first saw them in the Bank of Little Rock?

A. Because all Shippers' Order Notify bills of lading came to them and never came to me at all.

Q. What is the reason you state?

A. Because they were shippers' order notify bills of lading and were not open.

Q. That is the only reason you have for stating it?

A. That is all.

141 Redirect examination:

Q. Do you remember when they were delivered to the German National Bank?

A. My best recollection is they came in about that day or the day before with some drafts and the Bank of Junction City wanted currency and Mr. Walker did not have it.

Q. You remember the fact of leaving them at the Bank?

A. Yes sir, I got them out of the Bank of Little Rock.

Q. Had you ever seen them before?

A. No sir, not that I remember.

Cross-examination:

Q. How was it endorsed at the time you first saw it?

A. I do not know, I do not think it was endorsed, I think I endorsed it there in the Bank.

Q. What security could it be to the Bank until it was endorsed?
A. I do not know that it could be any, they asked me to endorse them.

Plaintiff here closes.

And this was all the evidence in the case introduced by either party.

142 Thereupon the plaintiff asked the court to instruct the jury as follows, to wit:

Instructions to Jury.

The court instructs the jury that the plaintiff is entitled to a verdict upon each bill of lading sued upon.

The defendant objected to the giving of said instruction; but the court against its objection gave it, and the defendant excepted.

The defendant separately asked the court to give each of the following eighteen instructions, to wit:

1. The jury are instructed that under all the facts of this case their verdict should be for the defendant.

2. The jury are instructed that if they find from the testimony that the defendant company promptly and safely transported the cotton in controversy from the points of shipment to El Dorado Arkansas, and there delivered it to the compress company its liability ceased on delivery and your verdict should be for the defendant.

3. If the Compress Company knew that the cotton was subjected to outstanding bills of lading, and with such knowledge received the cotton, then its became its duty and the defendant was warranted in believing that it would hold the cotton subject to such bills and deliver it as the bills of lading required, and if the compress company in violation of the provisions of the bills of lading shipped the cotton out or delivered it to or for other persons than the owners of the cotton, or holders of the bills of lading, and did so without the knowledge, connivance or procurement of defendant, then the plaintiff cannot recover for any cotton so delivered to the compress company and improperly shipped out or delivered by it.

4. The bills of lading sued on contained among the provisions printed in them one to the effect that unless the cotton was removed by the consignee from the station or depot at El Dorado within twenty four hours after its arrival that the cotton might
143 be removed and stored by the Company at the owner's risk and expense in the warehouse of the company or in one of its selection, and the said bills of lading in the directions written therein consigned the cotton to the cars of the El Dorado Compress Company by reason of which it became the duty of the defendant to deliver the said cotton to the said Compress Company upon its arrival at El Dorado, if the Compress Company knew that the cotton was subject to outstanding bills of lading, and received it with such knowledge, the law presumes and the defendant was authorized to assume that the Compress Company undertook to and would hold

the cotton subject to the conditions of the bill of lading unless it was otherwise understood, or the Compress Company directed or gave defendant to understand otherwise, and if it accepted the cotton to be held at the owner's risk and expense, subject to the conditions of the bill of lading, and while so holding it shipped it out or delivered it to another person than the owner, without the knowledge, procurement or connivance of the defendant then the plaintiff cannot recover for any cotton so shipped out or delivered.

5. If the jury believe from the evidence that by the terms of the bills of lading sued on, or any of them, the cotton therein subscribed was consigned to El Dorado, Arkansas, to the order of the shipper, care of the Compress, meaning the El Dorado Compress, and that the defendant carried the cotton to El Dorado and delivered it to the El Dorado Compress for the person who should present bills of lading covering such cotton, then as to all cotton consigned to the care of said Compress Company and delivered to it the verdict should be for the defendant.

6. It is not necessary to prove by direct evidence that the cotton delivered by the defendant to the Compress Company was understood by the Compress Company to be for the holders of the bills
144 of lading, but such fact like any other fact in the case may be proven by circumstances which fairly establish such understanding.

7. If the cotton was consigned to the care of the warehouse at El Dorado the defendant was authorized to deliver it to the warehouse on its arrival at El Dorado, and any person who acquired the bills of lading containing such directions took with notice of it and was bound by it, and no such persons can recover on the bills of lading for cotton delivered by such defendant to the Compress in pursuance of such direction in the bill of lading.

8. A bill of lading represents the property described in it while being transported and its assignment and transfer acts as a symbolical delivery of the property; but after the carrier finishes the transportation and delivers the property, the transfer of the bill of lading does not pass a right of action against the Company (unless the party making the transfer had such right at the time of transfer).

9. If the cotton represented by the bills of lading had been carried to El Dorado and delivered to the Compress Company by the defendant before plaintiff acquired the bills of lading for it the plaintiff cannot recover upon such bills of lading.

10. Before the plaintiff can claim any greater rights under the bill of lading than Alphin & Lake its seller or pledgor had at the time of the sale or pledge, it must show that it acquired the bills before the cotton described in them had reached El Dorado and was ready for delivery, if after the cotton reached El Dorado and was ready for delivery or had been delivered the plaintiff took the bills of lading from Alphin & Lake, at a time when Alphin & Lake
145 had no right to demand the cotton from defendant, then plaintiff can recover.

11. The plaintiff acquired its right to the bills of lading from Alphin & Lake Cotton Co. and not from the Bank of Little Rock;

and it can claim nothing in this case by reason of any right or claim that the Bank of Little Rock had in them prior to the transfer to plaintiff.

12. If the plaintiffs acquired the bills of lading from Alphin & Lake at a time when the cotton had been delivered to the Compress Company, and when under all the circumstances the plaintiff knew, or in view of the manner of defendant's conducting its business and transporting and delivering cotton to El Dorado ought to have known that the cotton had been delivered, then the plaintiff cannot recover on said bills of lading anything more than Alphin & Lake could have recovered, and if the *the* delivery to the Compress Company was made with the knowledge, consent, approval or acquiescence of Alphin & Lake and they afterwards appropriated or received the benefit of the cotton, then they could not recover upon the bills of lading.

13. The burden is upon the plaintiff to prove that it received the bills of lading before the cotton was delivered, and if it appears as to any of the cotton, that it was seasonably delivered to the Compress Company and there appropriated by the Alphin & Lake Cotton Company, the plaintiff cannot recover for such cotton unless it appears by a fair preponderance of the evidence that it acquired the bill of lading for the cotton before its delivery and appropriation by the Alphin & Lake Cotton Co.

146 14. If the cotton sued for or any of it was delivered to the Compress Company with the knowledge and approval of the Alphin & Lake Cotton Company or its officers or agents and Lake of that company, after such delivery, procured the bills of lading for any cotton so delivered from the Bank of Little Rock which held them as collateral for a loan to said Alphin & Lake, and if said Lake after so procuring said bills of lading from the Bank of Little Rock pledged them as security for the loan from the plaintiff, the plaintiff cannot recover for any such cotton.

15. Alphin & Lake could not have recovered on the bills of lading for cotton that had been delivered to the Compress Company at the time they transferred the bills to plaintiff; and the directions on the bills, care Compress, were sufficient to give plaintiff notice that the cotton had been or would be delivered to the Compress Company, and since it failed to act upon said notice or make inquiry such deliveries had been made it cannot recover.

16. If all the circumstances, including the age and directions of the bills of lading, length of the haul, and of the time necessary and usually taken to complete it and make delivery, were sufficient to put a person acquainted with them on notice that the cotton had been delivered then the plaintiff should have made inquiry before taking the bills, to ascertain whether such delivery had been made, and cannot recover for any cotton delivered before it took the bill of lading for that cotton.

17. The jury will not consider in any way testimony with regard to issuance of bills of lading by the Iron Mountain Railroad Company.

147 18. What Hutchinson, as the agent of the Iron Mountain Railroad Company, learned as to the over issue of bills of lading by that company was not imputable to this defendant.

19. If plaintiff is entitled to recover, it can in no event recover more than the amounts lent, to wit: $17,856.00, with interest thereon from December 6th, 1902, and $19,200.00, with interest from December 11th, 1902, at ten per cent. per annum, and if that exceeds the amount paid for the cotton, then the amount of recovery will be the price paid for the cotton, with interest at 6 per cent. per annum, from January 19th, 1903.

148 But the court refused to give each and all of the said instructions, and to its refusal to give each of them as separately asked, the defendant at the time saved its several exceptions.

And thereupon the jury retired to consider of their verdict and in pursuance of the instruction given by the court returned into the court the following verdict, to wit:

Verdict of Jury.

"We, the jury, find for the plaintiff in the sum of **$39,025.10.**

J. F. MARRABLE, *Foreman.*"

And thereupon, on the same day, and during the same term of court the defendant filed its motion for new trial, as follows, to wit:

Motion for New Trial.

In the Circuit Court of Union County, Arkansas.

GERMAN NATIONAL BANK, Plaintiff,
vs.
ARKANSAS SOUTHERN RAILWAY CO., Defendant.

Comes the defendant and asks the court to set aside the verdict of the jury rendered herein and grant a New Trial for the following reasons, to wit:

1st. The verdict of the jury is contrary to the law.

2nd. The verdict of the jury is contrary to the evidence.

3rd. The verdict of the jury is contrary to the law and evidence.

4th. The court erred in refusing to give instruction No. one (1) as asked by the defendant.

5th. The court erred in refusing to give instruction No. two (2) as asked by defendant.

6th. The court erred in refusing to give instruction No. three (3) as asked by defendant.

149 7th. The court erred in refusing to give instruction No. four (4) as asked by defendant.

8th. The court erred in refusing to give No. 5 as asked by defendant.

9th. The court erred in refusing to give instruction No. — (6) as asked by defendant.

10th. The court erred in refusing to give instruction No. (7) seven as asked by defendant.

11th. The court erred in refusing to give instruction No. (8) eight as asked by defendant.

12th. The court erred in refusing to give instruction No. — (9) as asked by defendant.

13th. The court erred in refusing to give instruction No. (10) ten as asked by defendant.

14th. The court erred in refusing to give instruction No. (11) eleven as asked by defendant.

15th. The court erred in refusing to give instruction No. 12 as asked by defendant.

16th. The court erred in refusing to give instruction No. 13 as asked by defendant.

17th. The court erred in refusing to give instruction No. 14 as asked by defendant.

18th. The court erred in refusing to give instruction No. 15 as asked by defendant.

19th. The court erred in refusing to give instruction No. 16 as asked by defendant.

20th. The court erred in refusing to give instruction No. 17 as asked by defendant.

21st. The court erred in refusing to give instruction No. 18 as asked by the defendant.

22nd. The court erred in refusing to give instruction No. 19 as asked by defendant.

150 23rd. The court erred in directing the jury to return a verdict for the plaintiff.

24-. The court erred in refusing to — witness Hutchinson to answer the following question "How long had the Arkansas Southern Railroad Company been delivering cotton in this way and storing it with or delivering it to the El Dorado Compress Co."

25th. Because the court erred in refusing to permit the witness Hutchinson to answer the following question: "Has it been the general usage of the defendant since the time the compress was built here at El Dorado as much as three years ago to store cotton at the compress for the benefit of the holder of the bill of lading?"

26th. Because the court erred — refus*ed* to permit the defendant to prove that it had been the usual custom and usage at El Dorado for the past three years for the cotton shipped on the Arkansas Southern Railroad to El Dorado to be delivered to the compress for the benefit of holders of bills of lading and that the usage was well known at this place."

27th. Because the court erred in permitting plaintiff to present any proof as to the issuance of bills of lading by the Iron Mountain Ry. Co.

28th. The court erred in refusing to permit the witness Hutchinson to explain what he meant by his statement in a deposition that

he supposed that all cotton coming in over the defendant's road and going into the compress went to the account of Alphin & Lake.

29th. Because the court refused to permit the defendant to read the letter from Walker to Hutchinson set out in the deposition of C. T. Walker.

ROSE, HEMINGWAY & ROSE,
GAUGHAN & SIFFORD,
For Defendant.

And thereupon a motion for new trial was upon the same
151 day submitted to the court, and by the court overruled, and to the action of the court in so doing the defendant at the time excepted, and on motion of the defendant, leave is given it to file its bill of exceptions within 90 days from this date.

Approval of Bill of Exceptions.

And now on this 22nd day of December, 1903, within the time allowed by the court, the defendant presents to the undersigned Judge of the Court, who presided at the trial of the above entitled cause, this, its bill of exceptions, and the same having been examined and found in all things correct, is approved and allowed, and directed to be filed by the Clerk of the Circuit Court of Union County as a part of the records in this cause.

This 22 day of December, 1903.

JAMES S. STEEL, *Circuit Judge.*

O. K. RATCLIFF & FLETCHER.
" ROSE, HEMINGWAY & ROSE.

152 *Cost Bill.*

To W. J. Pinson, Circuit Clerk	$15.55
same do. (This Transcript)	21.50
W. G. Pendleton, Sheriff	14.00
Justice Peace, Taking Depositions	4.00
C. T. Walker, Witness	1.50
C. P. Perry, Witness	1.50
	$58.05

153 *Clerk's Certificate.*

STATE OF ARKANSAS, *County of Union:*

I, W. J. Pinson, Clerk of the Circuit Court of Union County in the State of Arkansas, do hereby certify, that the above and foregoing transcript contains a true and compared copy of the original papers (except the summons; 5 Subpœnaes; and the depositions of J. D. Green, taken on interrogatories and cross interrogatories at Bernice, La. before J. E. Ferguson, J. P. and which were not called for

by bill of exceptions) filed in the case of, German National Bank, Plaintiff, *versus* Arkansas Southern Railway Company, defendant, disposed of in the Circuit Court of Union County, Arkansas, together with the orders and the proceedings of the said court thereon, and I further certify that said transcript contains a copy of the bill of exceptions as filed and all papers referred to and called for therein, with an attached index and cost bill, and that there are 137 pages.

In Testimony Whereof, I have this, the (2nd.) Second day of March A. D. 1904, set my hand as such Clerk and caused the seal of same to be affixed, at my office in El Dorado, Arkansas.

W. J. PINSON,
[L. S.] *Circuit Clerk.*

Comes the defendant and prays an appeal from the judgment herein.

ROSE, HEMINGWAY & ROSE,
Att'ys for Appellant.

Appeal to Supreme Court.

Appeal granted this 10th day of March, 1904.

P. D. ENGLISH, *Clerk,*
By J. H. CAMPBELL, *D. C.*

154 *Stipulation for Correcting the Record.*

In the Supreme Court of Arkansas.

No. 5619.

ARKANSAS SOUTHERN RAILROAD COMPANY
v.
GERMAN NATIONAL BANK.

Stipulation for Correction of Transcript.

It is stipulated between counsel for the plaintiff and defendant respectively that the transcript on file in this cause is erroneous and shall be corrected in the following particulars:

1. The transcript of the judgment contains the following language: "The said jury returns from the jury box by agreement of counsel the following verdict, to wit:" The clause "by agreement of counsel" is incorrect, and upon the hearing of the cause the transcript of the judgment shall be considered as amended so as to strike out that clause.

2. The transcript of the bill of exceptions on page 133 recites that the court refused to give each and all of the 19 instructions asked by the defendant, when in truth the court refused to give all of them except the 19th; but gave it, and the amount of the judgment was calculated in accordance with the rule which it prescribes; and it is

agreed that the transcript shall be amended so as to read as follows: "But the court refused to give each and all of said instructions except the 19th, and to its refusal to give each of them as separately asked the defendant at the time saved its several exceptions. And thereupon the jury retired to consider of their verdict, and in pursuance of the instructions given by the court, returned into court the following verdict, to-wit:"

ROSE, HEMINGWAY & ROSE,
For Appellants.
RATCLIFFE & FLETCHER,
For Appellee.

Endorsed: Filed May 8th, 1905. P. D. English, Clerk.

155 *Filing Stipulation.*

STATE OF ARKANSAS, *In the Supreme Court, set:*

Be it remembered, that at a term of the Supreme Court of the State of Arkansas, begun and held on the 28th day, being the fourth Monday of November, A. D. 1904, at the courthouse, in the City of Little Rock, the following proceedings were had to wit: On the 8th day of May, 1905, a day of said term:

5619.

ARKANSAS SOUTHERN RAILROAD CO., Appellant,
v.
GERMAN NATIONAL BANK, Appellee.

Appeal from Union Circuit Court.

Come the parties by their respective attorneys and file their stipulation amending the record herein to speak the truth under Rule 25.

156 STATE OF ARKANSAS, *In the Supreme Court, set:*

Be it Remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 22nd day being the fourth Monday of May, A. D. 1905, at the Courthouse, in the City of Little Rock, the following proceedings were had, to wit: On the 23rd day of October, 1905, a day of said term:

Orders.

5619.

ARKANSAS SOUTHERN RAILROAD COMPANY, Appellant,
v.
GERMAN NATIONAL BANK, Appellee.

Appeal from Union Circuit Court.

By consent on parties this cause is set for argument on November 13th, 1905.

And on November 11th 1905,
On motion and for cause shown this cause is reset for oral argument on November 27th inst.

And on November 27th, 1905,
Argued orally and submitted, and by the court taken under advisement.

157 STATE OF ARKANSAS, *In the Supreme Court, set:*

Be it Remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 27th day, being the fourth Monday of November A. D. 1905, at the Courthouse, in the City of Little Rock, the following proceedings were had, to wit: On the 20th day of January, 1906, a day of said term:

Judgment.

5619.

ARKANSAS SOUTHERN RAILROAD COMPANY, Appellant,
v.
GERMAN NATIONAL BANK, Appellee.

Appeal from Union Circuit Court.

This cause came on to be heard upon the transcript of the record of the Circuit Court of Union County and war argued by counsel, on consideration whereof it is the opinion of the court that there is no error in the proceedings and judgment of said Circuit Court in this cause.

It is therefore considered by the Court that the judgment of said Circuit Court in this cause rendered be and the same is hereby in all things affirmed with costs, and that the appellee recover of said appellant and George C. Griffith, surety on the supersedeas bond filed in this cause, the sum of Thirty nine thousand and twenty five dollars and ten cents, with interest thereon at the rate of six per cent. from the 12th day of October A. D. 1903, the amount of judgment of said Circuit Court.

It is further considered that said appellee recover of said appellant and said surety all its costs in this Court and the Court below in this cause expended and have execution thereof.

McCulloch, J. dissents.

And on February 3, 1906,

158 Comes the appellant by attorneys and moves the Court for an extension of ten days' time in which to file a petition for rehearing, and for time in which to file briefs thereon. On consideration thereof it is ordered by the Court that said appellant have an extension of 10 days' time to file such petition for rehearing, and that it be granted three weeks' time from this date in which to file its briefs.

And on February 17th, 1906,

The appellant having filed its petition for rehearing within the extension of time heretofore granted, viz: on the 12th inst., the same is noted of record.

And on April 23, 1906,

Being now sufficiently advised, the petition filed for rehearing in this cause is by the court denied.

Orders.

And on May 7th, 1906.

For sufficient cause shown it is ordered by the court that the judgment in this cause entered on the 20th day of January A. D. 1906, a day of the present term, be vacated and set aside, and that said judgment be re-entered as of this date. Whereupon

This cause came on to be heard upon the transcript of the record of the Circuit Court of Union County, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said Circuit Court in this cause.

It is therefore considered by the Court that the judgment of said Circuit Court in this cause rendered be and the same is hereby in all things affirmed with costs, and that said appellee recover of said appellant and Geo. C. Griffith, surety on the supersedeas bond filed in this cause, the sum of Thirty nine thousand and twenty-five dollars and ten cents, with interest thereon at six per cent. from the 12th day of October A. D. 1903, the amount of judg-
159 ment of said Circuit Court.

It is further considered that said appellee recover of said appellant and said surety all its cost in this court, and the court below in this cause expended and have execution thereof.

160 No. 60.

In the Supreme Court of Arkansas, Jan'y 20, 1906.

Arkansas Southern Ry. Co. *v.* German National Bank.

Opinion.

BATTLE, *J.*:

The German National Bank brought an action against the Arkansas Southern Railway Company, to recover the value of cotton on bills of lading issued by the company for the cotton and assigned to the bank; the cotton never having been delivered.

The facts in the case are substantially as follows: Alphin & Lake Cotton Company were dealers in cotton at Little Rock, Arkansas, and were the principal owners of a compress at El Dorado. They purchased cotton at Bernice, La., and at Junction City, Ark., and at other places along the road of the railroad company. At

Bernice the cotton purchased was paid for by the Bank of Bernice and shipped in its name over the railroad of the defendant to El Dorado, a terminus of the railroad, about thirty miles from Bernice. Bills of lading were issued to the shipper in which it undertook to deliver the cotton to shipper's order at its destination. They were forwarded to the Bank of Little Rock with drafts on Alphin & Lake Cotton Co. attached for collection. Nine hundred and fifty one bales of cotton were purchased by Alphin & Lake and shipped in the name of the Bank of Bernice over defendant's road from Bernice to El Dorado. Bills of lading were issued for all of them and forwarded to the Bank of Little Rock with drafts attached in the manner indicated.

"Cotton at Junction City was handled very much in the same way, except that the bills of lading showed Alphin & Lake Cotton Company as consignor, and the bills of lading, with drafts for the price attached were forwarded to the Bank of Little Rock.

"When the drafts and bills of lading arrived at Little Rock, Alphin & Lake Cotton Company would draw drafts for the amount on the Bank of Little Rock, which would pay the same by taking
161 up the original drafts for the price of the cotton, and would retain the bills of lading as security for the amounts and all other indebtedness Alphin & Lake Cotton Company owed that bank.

"The bills of lading were all to shipper's order, care of Compress, El Dorado, Ark.; notify Alphin & Lake Cotton Company. The cotton was usually loaded on the cars before the bills of lading were signed, and usually left the shipping station the same or next day after the bills of lading were signed up, and reached El Dorado within twenty four hours after it left Bernice and was delivered to the Compress Company for account of Alphin & Lake Cotton Company.

"The railroad had no warehouse or place for delivery or storage at El Dorado. It only had a joint track with the St. Louis Iron Mountain & Southern Railroad Company, and the two roads maintained a joint agent, Hutchinson, at that place. The Arkansas Southern Railroad Company delivered all cotton which came in over its road at the compress. It had no cotton platform, and the compress was the only place it had for the delivery of cotton. Before the cotton was delivered to the compress a memorandum was made of it in a little book by the railroad, showing the initial and number of the car, the number of bales in the car and the place of shipment. The cotton was checked up by Mr. Wright, assistant manager of the compress company, and, if found correct, he wrote "O. K.," and signed his name on it with the date of his O. K.

"In delivering cotton to the compress company no other directions were given to it than that contained in this little book. Nothing was said about it in any other way. It was just delivered by that little book, and that was all that passed between the parties. It was always supposed to belong to Alphin & Lake Cotton Company by the compress and railroad, and was unloaded at once. All the compress company did was to count the cotton and O. K. the book as to the number of bales. Neither "S. O.," meaning shipper's

order, nor "care of the compress company" was on this little
162 book. "S. O." appears to be upon the book now, but was placed there after the cotton was delivered. It was not on the way bill from which the book was made up."

The cotton was treated as belonging to Alphin & Lake Cotton Company, and was delivered without taking up the bills of lading.

"On December 6, 1902, Lake applied to the German National Bank, which advanced $17,806.00 on bills of lading for 558 bales of cotton, and on December 11th the bank advanced $19,200.00 on bills of lading for 441 bales, with the understanding that the bills of lading first delivered should also stand for the last advancement. At the time Lake applied for the first advancement, the bills of lading were in the hands of the Bank of Little Rock. He stated that the Bank of Little Rock had required Alphin & Lake Cotton Company to reduce its account, and a draft was drawn by the company upon the bank in favor of the Bank of Little Rock, with the bills of lading attached, which was presented by and paid to the Bank of Little Rock. At the time the advancement for $19,200 was made the bills of lading were the property of the Bank of Little Rock, and Lake was permitted to take them from the Bank of Little Rock to the German National Bank with the understanding that they or the money for them should be returned to the Bank of Little Rock. The German National Bank issued $10,000 in New York Exchange in favor of the Bank of Little Rock and paid $9,200 in cash which Lake & Perry handed to the Bank of Little Rock in lieu of the bills of lading, and the account of Alphin & Lake Cotton Co. was credited with $19,200 by the Bank of Little Rock."

The German National Bank lost the cotton. It was delivered to other parties. The bank recovered judgment in this action; and the defendant appealed.

Is appellant responsible for the loss of the cotton?

At common law a bill of lading is a muniment of title to the goods or property therein specified—is a symbol or representative
163 of the goods—"when properly indorsed and delivered, with the intention of passing the title to them, is a symbolic or constructive delivery of the goods themselves; and when assigned the carrier, having notice of the assignment, becomes bound to deliver the goods to the assignee. If the goods, by the terms of the bill of lading, are deliverable to the order of the shipper, the carrier should not deliver except upon the production of the bill of lading properly indorsed by the shipper; "for this is notice to the carrier that the shipper intends to retain in his power the ultimate disposition of the goods." North Pennsylvania Railroad Company *v.* Commercial Bank of Ohio, 123 U. S. 727, 734, 736; The Thames, 14 Wall. 98; Hutchinson on Carriers (2nd Ed.) §§ 129,130; Daniel on Negotiable Instruments, §§1728, 1731.

The responsibility of the carrier for the goods continues after their arrival at the place of destination, until they are ready to be delivered and the owner or consignee has had a reasonable time and opportunity to examine them and take them away. If they are not called for by the party entitled to them within that time, it is the duty of

the carrier to retain them until they are claimed or store them prudently for and on account of their owner. When his responsibility as a carrier ceases he becomes liable for the goods as a warehouseman. He is responsible either as carrier or warehouseman until the goods are properly delivered. The bill of lading is evidence of that obligation. North Pennsylvania Railroad *v.* Commercial Bank, 123 U. S. 727, 734, 736; The Thames, 14 Wall. 98; The Titana, 124 Fed. Rep. 975; Blumenthal *v.* Brainerd, 38 Vt. 402.

For the enforcement of these duties and the protection of the parties in interest, the statutes of this state, provide: "Warehouse receipts given by any warehouseman, wharfinger or other person or firm for any goods, wares, merchandise, cotton, grain, flour or other produce or commodity, stored or deposited, and all bills of lading and transportation receipts of every kind given by any car-
164 rier * * * may be transferred by indorsement in writing thereon, and the delivery thereof so indorsed, and any and all persons to whom the same may be transferred shall be deemed and be held to be the owner of such goods, wares, merchandise, cotton, grain, flour or other produce or commodity, so far as to give validity to any pledge, lien or transfer given, made or created thereby, as on the faith thereof, and no property so stored or deposited, as specified in such bills of lading or receipts, shall be delivered except on surrender and cancellation of such receipts and bills of lading; provided, that all such receipts and bills of lading which shall have the words, 'not negotiable' plainly written or stamped on the face thereof shall be exempt from the provisions of this act." Kirby's Digest §530.

And the Act further provides: "Any warehouseman, wharfinger, forwarder or other person who shall violate any of the provisions of this act shall be deemed guilty of a criminal offense, and upon indictment and conviction shall be fined in any sum not exceeding five thousand dollars, or imprisoned in the penitentiary of this State not exceeding five years, or both; and all and every person or persons aggrieved by the violation of any of the provisions of this act may maintain an action at law against the person or persons, corporation or corporations violating any of the provisions of this act, to recover all damages which he or they may have sustained by reason of any such violation aforesaid, before any court of competent jurisdiction, whether such person or persons shall have been convicted of fraud as aforesaid under this act or not." Kirby's Digest, §531.

Appellant does not claim that it has delivered the cotton in question in compliance with these statutes, but contend- that the statutes are in conflict with the clause of the Constitution of the United States which vests Congress with power to regulate commerce among the states. But they are not in conflict. It is the duty of the carrier to deliver property specified in a bill of lading to the legal
165 holder thereof. The object of the statutes, and the effect if obeyed, is to enforce this duty and protect the rights of the holder. In the absence of congressional legislation upon the subject, the State can do so.

In Western Union Telegraph Company *v.* James, 162 U. S. 650, the court held that a statute of the State of Georgia, "requiring every telegraph company with a line wholly or partly within that State to receive dispatches on payment of the usual charges and transmit and deliver them with due diligence, under a penalty of $100, is a valid exercise of the power of the State in relation to messages by telegraph from points outside of and directed to some point within the State." The court in construing that statute says: "The statute in question is of a nature that is in aid of the performance of duty of the company that would exist in the absence of any such statute, and it is in no wise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the Federal Constitution under discussion? We think not."

In Chicago, Milwaukee & St. Paul Railway Company *v.* Solan 169 U. S. 133, it was held that "a statute of a state, providing that no contract shall exempt any railroad corporation from the liability of a common carrier, or carrier of passengers, which would have existed if no contract had been made, does not, as applied to a claim for an injury happening within the State under a contract for interstate transportation contravene the provision of the Constitution of the United States empowering Congress to regulate interstate commerce." The court said: "Railroad corporations, like all other corporations and persons doing business within the territoria'
166 jurisdiction of a State, are subject to its law. It is in the law of the State that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the measures by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons travelling on inter-state trains are as much entitled, while within a State, to the protection of that State as those who travel on domestic trains. A carrier exercising his calling within a particular State, although engaged in the business of interstate commerce is answerable, according to the law of the State, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place; or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, the right of action for the consequent damage is given by the local law. It is equally within the power of the State to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, the State has the power to redress and to punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not

in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate rights and duties of all persons and corporations within its limits."

We have made investigation for and have not found, statutes of Congress upon the subject matter of Sections 530 and 531 of Kirby's Digest. These statutes do not impose any burdens upen interstate commerce, but are in aid of it, to the extent that they provide
167 for the enforcement of duties and protection of rights already existing; and are useful and necessary legislation, and are valid, in the absence of Congressional legislation inconsistent with them. Railway Company *v.* Fuller, 17 Wall. 560; Gulf, Colorado, &c. Railway Co. *v.* Hefley, 158 U. S. 103; Nashville C. & St. L. Railway Co. *v.* Alabama, 128 U. S. 96.

In Central of Georgia Railway Company *v.* Murphy, 196 U. S. 194, cited by appellant, the State statute in question imposed upon the initial or any connecting carrier the duty of tracing freight which had been lost, damaged or destroyed on its or connecting carrier's line, and of informing the shipper in writing, when, where, how and by which carrier it was lost, damaged or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information can be established; and provided, that "if the carrier to which application is made shall fail to trace said freight, give said information, in writing, within the time prescribed, it shall be liable for the value of the freight lost, damaged, or destroyed, in the same manner and to the same amount as if said loss, damage or destruction occurred on its line." The court held that statute was a violation of the interstate commerce clause of the Federal Constitution and void. The court, in considering this statute said: "Without the provisions of the statute in question, the plaintiff in error would not be liable to the shippers in this case if, without negligence, they delivered the consignment in good condition to the succeeding carrier. This they offered to prove was the case. But if this statute be valid, this limitation of liability can only be availed of by the railroad company by complying with its provisions. In other words, before it can avail itself of the exemption from liability beyond its own line provided by its valid contract, the initial or any connecting carrier must comply with the terms of the statute and must within thirty days after notification obtain and give to the shipper the information provided for therein. This is certainly a direct burden upon interstate commerce, for it affects most vitally the law in relation to that
168 commerce, and prevents the exemption provided by a legal contract between the parties from taking effect, except upon terms which we hold to be a regulation of interstate commerce. * * * * * The effect of such a statute is direct and immediate upon interstate commerce. It directly affects the liability of the carrier of freight destined to points outside the State, with regard to the transportation of articles of commerce; it prevents a valid con-

tract of exemption from taking effect, except upon a very onerous condition, and it is not of that class of State legislation which has been held to be rather an aid to than a burden upon such commerce. The statute in question prevents the carrier from availing itself of a valid contract, unless such carrier comply with the provisions of the statute by obtaining information which it has no means of compelling another carrier to give, and yet if the information is not obtained the carrier is to be held liable for the negligence of another carrier over whose conduct it has no control. This is not a reasonable regulation in aid of interstate commerce, but a direct and immediate burden upon it." No such objections can be urged against sections 530 and 531 of Kirby's Digest. The statute in the two cases are wholly unlike.

Appellant failed to deliver the cotton on the surrender and cancellation of the bills of lading issued therefor, and under the statute of this State is liable to the appellee for damages. But appellant insists that, according to the bills of lading, it was to transport the cotton to El Dorado and deliver it to the care of the Compress Company, and that when it did so it discharged its whole duty, and was thereby relieved of further responsibility. If this contention be correct, the stipulation in the bills of lading by which appellant undertook to deliver the cotton to the order of the shipper was meaningless. According to the stipulation, it could not have delivered the cotton except upon the production of the bills of lading properly indorsed; for this was notice to the carrier that the shipper intended to retain in his power the ultimate disposition of the goods (cotton). The failure of the legal holder of the bills of lading to appear for the purpose of receiving the cotton when it reached its destination did not relieve appellant of further responsibility. But under the contract and the law it had the right to store the cotton with the compress company with authority and directions to deliver it to the person entitled to it upon the production of the bills of lading properly indorsed. Under the contract as shown by the bills of lading, it was relieved of liability on account of the storage but not of the failure to deliver according to law. See Midland National Bank *v.* Mo. Pac. R. Co. (Mo.) 33 S. W. 521, 525.

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Judgment affirmed.

McCulloch, J. dissents.

170 *Dissenting Opinion.*

In the Supreme Court of Arkansas, January 20, 1906.

No. 68.

ARK. SOU. RY. CO.

v.

GERMAN NATIONAL BANK.

MCCULLOCH, *J.* (Dissenting):

I do not agree with the majority of the court in holding that the liability of the railway company for the loss of the cotton is estab-

lished by undisputed evidence, and that the trial court was correct in directing a verdict for the plaintiff. The cotton was consigned to the shipper's order, care of the compress company at El Dorado. The Railway Company complied with the contract by delivering it to the compress company. The language of the contract, was in effect a selection in advance by the consignee of a place of delivery and the designation of an agent to accept the delivery for him. The consignee cannot complain because the carrier delivered the cotton at the place and to the agency designated, without requiring a surrender of the bill of lading, nor can the assignee of the consignee complain unless the statute quoted in the majority opinion prohibits a delivery by the carrier, under the circumstances of this case, without requiring a surrender of the bill of lading. I do not think that the statute in question has any application to the facts.

In the absence of any statute on the subject, it is the duty of a common carrier of freight, either by land or water, when the point of destination is reached and the consignee fails to call for the property or refuses to accept it, not to abandon it but to properly store it for the benefit of the consignee; and the carrier may when it has no warehouse of its own for bulky freight such as cotton, grain and the like, discharge itself from further liability by placing the goods in store with a responsible warehouseman for the benefit of the owner. When thus delivered, the warehouseman so selected becomes the agent and bailee of the owner. The carrier is not bound to provide storage room of its own for bulky freight of that character. 2 Rorer on Railroads p. 1286; Fisk *v.* Newton, 1 Denio, 45; Ala. & Tenn. R. R. Co. *v.* Kidd, 35 Ala. 209; Navigation Co. *v.* Marshall,
171 48 Ind. 596; Merchants' Dispatch Co. *v.* Hallock, 64 Ill. 284.

There is a clear distinction between the duty of a carrier to furnish suitable facilities for loading and unloading freight and its duty in respect to storage of freight after it reaches its destination.

The warehouseman so selected being the agent of the owner and not of the carrier, the latter is liable to the former for his negligence. The measure of the carrier's duty is in the selection of a responsible and trustworthy warehouseman. If it exercises ordinary care in selecting a warehouseman of known reliability, and delivers the freight to him for the benefit of the owner, it is not responsible for any loss occurring therafter by reason of the negligence of the warehouseman in delivering the property to the wrong person. Now, the statute in question does not alter this rule of law in any wise. Notwithstanding the statute, a carrier is not bound to provide warehouse room for storage of cotton or other bulky commodity, nor is it compelled to keep the cotton in cars until called for by the holder of the bill of lading. It may still store with a responsible warehouseman and thereby discharge itself from further liability. In fact, it is a feature of the transportation and handling of cotton sufficiently notorious for us to take knowledge of that railroads do not provide warehouses for cotton at points of destination, but that this feature of the business is taken care of by other concerns owning and operating compresses and storage warehouses at intermediate and terminal points. In the face of this universal custom, I cannot believe that the

legislature meant to change the established rules of law concerning the duties of carriers in this respect, and to require the carrier of cotton and other bulky freight either to provide at its own expense warehouses for the storage of such freight, or constitute as its agent other warehouseman whom it may select for this purpose. This would be carrying the effect of the statute in my judgment, far beyond the obvious intention of the law makers.

172 It seems to me that by this statute it was only intended to prevent a delivery of the freight except upon surrender of the bill of lading, and that the same duty and responsibility is imposed upon the warehouseman after the freight passes into his hands for storage. In this case it cannot be said that the railway company was guilty of any negligence in the selection of a responsible warehouseman. The compress company is conceded to have been entirely responsible at the time of the delivery of the cotton. It was the only storage place for cotton at that point, and was generally used for compress and storage purposes by all who shipped cotton to El Dorado. Moreover the selection was made by the consignor, who was the consignee, and any negligence in the selection, if any, would be chargeable to him, and not to the carrier.

But it is contended that the railway company is liable in this case for the loss of the cotton because its agent was guilty of negligence in failing to notify the manager of the compress company of the fact that the cotton had been consigned to shipper's order. The opinion of the majority is, as I understand, based upon this theory.

I am not sure that under the facts of this case, any duty rested upon the railway company to notify the compress company of the nature of the shipment. The consignee having selected the compress company as his agent to receive and store the cotton it would seem to be his duty to give the necessary notice that the cotton was to be held subject to his own order. Be that as it may, however, I think the trial court was clearly in error in directing a verdict, as it was not shown beyond dispute that the agent of the railway company failed to notify the manager of the compress company that the cotton was consigned to shipper's order.

In the first place this instruction was erroneous because the negligence of the railway company in this regard was not put in issue by the pleadings. The complaint contains no allegations of negligence in this respect. It is simply alleged therein that the defend-

173 ant received the cotton for shipment and failed to deliver the same to plaintiff as the holder of the bills of lading, and judgment is asked, on that account, for the value of the cotton. The plaintiff manifestly relied upon the force of the statute in prohibiting a delivery without surrender of the bills of lading, and not upon any negligence of the carrier in delivering to the compress company without notice of the nature of the consignment. The court in directing a verdict on this question did so upon a charge of negligence not set forth in the pleadings.

In the next place, the direction was erroneous because the testimony was conflicting as to whether proper notice was given, and it should have been submitted to the jury.

The railroad station agent testified that the book from which the manager of the compress company checked up the cotton and signed receipts for same showed that the cotton had been consigned to shipper's order. The jury would have been justified in finding from this that the manager received information as to the nature of the consignment and that the cotton must be held subject to the shipper's order. It is true that on cross-examinatino of the witness the plaintiff undertook to discredit this testimony by showing the letters "S. O.," meaning "shipper's order" appeared written in the book in a different handwriting from that of the other memoranda. The witness admitted that this appeared to be true in some instances, but he does not say when it was written, or that it might have been added after the delivery of the cotton and signing of the memoranda in the book and, taking the whole of his testimony, the jury might have found from it that the letters "S. O." were a part of the memoranda in the book when signed by the manager of the compress company and that it conveyed the necessary information to the latter. The manager of the compress company who received the cotton was introduced as a witness by plaintiff and testified concerning the transactions, but he does not say positively that the letters "S. O." were not in the book when he signed it. He merely said that "if it did I don't
174 remember ever seeing it in there." I think the majority opinion is inaccurate in the statement that the letters "S. O." appear to be upon the book but were placed there after the cotton was delivered." There was sufficient evidence to go to the jury upon the question of defendant's negligence in delivering the cotton to the compress company without directions or information.

Moreover the undisputed testimony shows that the compress company and the Alphin & Lake Cotton Co., two corporations, were under the same management. E. H. Lake was the active controlling officer in both, and directed the business and affairs of each. He purchased the cotton for the Alphin & Lake Cotton Company and directed the method of shipment; the cotton was handled by the compress company under his management and direction, and he shipped it out from the compress company. He is the individual who is solely responsible for the diversion of the cotton. Under those circumstances I think it would be a manifest injustice to charge the railway company with negligence in failing to give information to the compress company of facts which it already knew through the man who was controlling and directing its affairs and business in handling this cotton. At least, it seems to me that this situation was sufficient to go to the jury on the question of negligence, for if the compress company already knew that the cotton was to be held subject to the shipper's order, the railway company should not be charged with negligence in failing to again give information of that fact, nor could the negligence of the railway company under those circumstances be the proximate cause of the loss of the cotton.

The judgment should, in my opinion, be reversed, and the cause remanded.

175 *Petition for Rehearing.*

In the Supreme Court of Arkansas.

No. 60.

ARKANSAS SOUTHERN RY. CO., Appellant,
vs.
GERMAN NATIONAL BANK, Appellee.

Petition of Appellant for Rehearing.

Comes the appellant, the Arkansas Southern Ry. Co. and petitions the court to reconsider its judgment heretofore rendered herein and for cause says:

That the judgment of the court affirming the decision of the circuit court of Union County is based upon the finding of fact by the Court, that the Arkansas Southern Ry. Co. delivered the cotton in controversy to the El Dorado Compress Co. for account of Alphin & Lake Cotton Co. Upon this finding of fact the court concludes, that while the said Railway Co. was relieved of liability on account of the storage of said cotton, it was liable on account of a failure to deliver according to law. Appellant insists that there was error in the finding of the court, that the cotton was delivered to the account of the Alphin & Lake Cotton Co. and insists that under the testimony in the case as will be seen in the transcript and in its abstract filed herein, as also in its statement of facts in its brief, it appears that said cotton was delivered by it to the El Dorado Compress Company, as stated by the witness Hutchinson, as billed; that is, it was delivered to the Compress Co. under the direction in the bill of lading "care of the El Dorado Compress Co."

Appellant further says that there is error in the judgment of the court in not reversing the judgment of the lower court and in not directing the lower court to submit to a jury the question as to whether or not the cotton in controversy was stored by the appellant with the said Compress Co. to the account of Alphin & Lake

176 Cotton Co. because it says, that even if it be true that the witness Hutchinson had stated on an occasion prior to the time of his testimony herein that he supposed the cotton had been placed in the Compress to the account of Alphin & Lake Cotton Co. it is error that such a statement should be treated as a confession binding on appellant, it being admissible only as a matter of impeachment and the effect of it being purely a question for a jury.

Appellant further says that there is error in the judgment of the court in its failure to reverse the judgment of the lower court for the error set forth in the 28th ground of the motion for a new trial filed by the appelleant in the lower court.

For further ground for the rehearing appellant says that the court erred in applying the statutes of Arkansas under the chapter "Bills of Lading, Receipts, etc.," being chapter Fifteen of Kirby's Digest

of the statutes of Arkansas or any section or provision thereof to the decision of this case because the statute so applied and each and every provision thereof so applied is in violation of the clause of the constitution of the United States giving to the Congress of the United States the power to regulate commerce between the several states of the Union and is therefore void as applied to this cause and the court erred in giving any effect to such statute or any part thereof, effect in this case.

It further says that the basic question underlying the judgment of the court is, whether the cotton in controversy was delivered to the Compress Co. by the Railway Co. to the account of Alphin & Lake Cotton Co. or for storage, and it says that this question is one of fact, the correct answer to which depends upon many facts and circumstances in evidence as well as the direct testimony of witnesses. That from the circumstances in evidence and the testimony of the witnesses directed to that question the minds of reasonable men may draw different conclusions. Wherefore, it says that the same
177 is a jury question and there is error in depriving appellant of the right to have the same passed upon by a jury.

ROSE, HEMINGWAY & ROSE,
GAUGHAN & SIFFORD,
For Appellant.

In the Supreme Court of Arkansas.

No. 60.

ARKANSAS SOUTHERN RY. CO., Appellant,
vs.
GERMAN NATIONAL BANK, Appellee.

I, T. J. Gaughan, do hereby certify that I am one of the attorneys of record for the Arkansas Southern Ry. Co., appellant, and do verily believe that the decision of the court in the above styled cause is erroneous and that the foregoing petition for rehearing states grounds that are substantial and worthy of the consideration of the court, and that the errors complained of are based upon facts overlooked appearing in the abstract of the transcript prepared for appellant.

Witness my hand this 10th day of February, A. D. 1906.

T. J. GAUGHAN.

Endorsed: Filed Feb'y 12th, 1906. P. D. English, Clerk.

178 *Authentication of Record.*

Supreme Court, State of Arkansas.

I, Peyton D. English, Clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of the Arkansas Southern Railroad Com-

pany and George C. Griffith, *versus* German National Bank, and also of the opinion of the court rendered therein as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this June 9th, 1906.

[Seal Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas.

Costs in Supreme Court, Arks.

Appellee, printing briefs..... $15.00
Transcript to U. S. Sup. Court..... $62.80

Paid by P'tiff in error.

Attest:
PEYTON D. ENGLISH, *Clerk.*

179 [Endorsed:] No. —. Arkansas Southern Railroad Co. *et. al.*, Plaintiffs in Error, *v.* German National Bank, Defendant in Error. Error to Supreme Court of Arkansas. Transcript.

Endorsed on cover: File No. 20,291. Arkansas supreme court. Term No. 326. The Arkansas Southern Railroad Company and George C. Griffith, plaintiffs in error, *vs.* The German National Bank. Filed June 23, 1906. File No. 20,291.

Office Supreme Court, U. S.
FILED.
OCT 16 1907
JAMES H. McKENNEY,
Clerk.

No. 56.

IN THE

Supreme Court of the United States

OCTOBER TERM A. D. 1906.

[redacted]

THE ARKANSAS SOUTHERN RAILROAD COMPANY and GEORGE C. GRIFFITH,
Plaintiffs in Error,
vs.
THE GERMAN NATIONAL BANK,
Defendant in Error.

Error to the Supreme Court of Arkansas.

BRIEF OF THE ARKANSAS SOUTHERN RAILROAD COMPANY.

EDWARD B. PEIRCE,
For Plaintiffs in Error.

GUNTHORP-WARREN PRINTING CO., CHICAGO

(20,291)

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IN THE

Supreme Court of the United States.

OCTOBER TERM A. D. 1906.

No. 326.

THE ARKANSAS SOUTHERN RAILROAD COMPANY and GEORGE C. GRIFFITH,
Plaintiffs in Error,
vs.
THE GERMAN NATIONAL BANK,
Defendant in Error.

Error to the Supreme Court of Arkansas

STATEMENT OF THE CASE.

I.

In the autumn of 1902 Alphin & Lake Cotton Co. purchased 951 bales of cotton situated at Bernice, Louisiana. The Bank of Bernice had an interest in the cotton, having advanced money to Alphin & Lake for the purchase thereof. Alphin & Lake wished to ship the cotton to Eldorado, Arkansas, and they accordingly caused the bank to have the same shipped from Bernice, Louisiana, to Eldorado, Arkansas, via the railway of the Arkansas Southern Railroad Company, a

common carrier, plaintiff in error here, whose line extended from Bernice to Eldorado. (Printed transcript, pages 31-33, 46-55.)

II.

The bills of lading were made out by the agents of Alphin & Lake and tendered to the agent of the railway company and signed by him. The shipping directions, inserted by the shippers in the company's printed form of bills of lading, were as follows:

"Consigned to S/O
C/o Compress
ElDorado, Ark.
Ntf'y Alphin & Lake Cotton Co." (Printed Trans., 31.)

The bills of lading were delivered to the Bank of Bernice and attached to drafts drawn by it on Alphin & Lake Cotton Co. to cover the advances made by the bank for Alphin & Lake in purchasing the cotton. The drafts and bills of lading were sent to Little Rock, Arkansas, where Lake resided.

The shipments were on the following dates and in the following amounts:

Nov. 22, 1902,	Bernice, La.,	to	Eldorado, Ark.	25 Bales.
Nov. 24, 1902,	"	"		72 "
Nov. 25, 1902,	"	"		49 "
Nov. 26, 1902,	"	"		74 "
Nov. 28, 1902,	"	"		48 "
Nov. 29, 1902,	"	"		72 "
Dec. 2, 1902,	"	"		96 "
Dec. 3, 1902,	"	"		122 "
Dec. 3, 1902,	"	"		49 "
Dec. 8, 1902,	"	"		26 "
Dec. 9, 1902,	"	"		75 "
Dec. 9, 1902,	"	"		74 "
Dec. 10, 1902,	"	"		120 "
Dec. 22, 1902,	"	"		48 "

(Printed Transcript, p. 31, 60–63.)

III.

Each of the bills of lading contained the following clause (Printed Trans., 30):

> "Notice.—This contract is accomplished, and the liability of the companies as common carriers thereunder terminates on the arrival of the cotton at the station or depot of delivery, and it is understood and agreed that the companies will be liable as warehouseman only thereafter; and, unless removed by the consignee from the station or depot of delivery within twenty-four hours after its said arrival the cotton may be removed and stored by the company at owner's risk and expense in the warehouse of the company or one of its selection; and after remaining in such warehouse sixty days, the carrier at point of destination may, at its election, advertise in one or more newspapers published in that county for not less than ten days, and sell the cotton either at that point or at such point on its line as it may select, and out of proceeds of such sale pay all charges."

IV.

At the time these shipments were made, the following statute was in force in Arkansas (Kirby's Dig., 530):

> "Sec. 530. Warehouse receipts given by any warehouseman, wharfinger or other person or firm for any goods, wares, merchandise, cotton, grain, flour or other produce or commodity, stored or deposited, and all bills of lading and transportation receipts of every kind given by any carrier, boat, vessel, railroad, transportation or transfer company, may

be transferred by indorsement in writing thereon, and the delivery thereof so indorsed, and any and all persons to whom the same may be transferred shall be deemed and held to be the owner of such goods, wares, merchandise, cotton, grain, flour or other produce or commodity, as far as to give validity to any pledge, lien or transfer given, made or created thereby, as on the faith thereof, and no property so stored or deposited, as specified in such bills of lading or receipts, shall be delivered except on surrender and cancellation of such receipts and bills of lading; provided that all such receipts and bills of lading which shall have the words 'Not negotiable' plainly written or stamped on the face thereof shall be exempt from the provisions of this act."

"Sec. 531. Any warehouseman, wharfinger, forwarder or other person who shall violate any of the provisions of this act shall be deemed guilty of a criminal offense, and upon indictment and conviction shall be fined in any sum not exceeding five thousand dollars, or imprisoned in the penitentiary of this state not exceeding five years, or both; and all and every person or persons aggrieved by the violation of any of the previsions of this act may have and maintain an action at law against the person or persons, corporation or corporations violating any of the provisions of this act, to recover all damages which he or they may have sustained by reason of any such violation as aforesaid, before any court of competent jurisdiction, whether such person or persons shall have been convicted of fraud as aforesaid under this act or not." (Printed Trans., 103.)

V.

The railway company transported the cotton to Eldorado, a distance of thirty miles, each shipment moving the day the bill of lading was signed or the day after, and arriving at Eldorado the same day or the day after. Upon arrival at Eldorado, the cotton was delivered by the railway company to the compress company, in accordance with the direction contained in each of the bills of lading and in accordance with the clause above quoted.

VI.

As the shipments were made, the Bank of Bernice made sight drafts with bills of lading attached upon Alphin & Lake, at Little Rock, Arkansas, sending the drafts through the Bank of Little Rock, at Little Rock. Alphin & Lake paid the drafts as presented by giving their check upon the Bank of Little Rock, the Bank of Little Rock honoring the check and holding the bill of lading as security for the payment thereof. Afterward, by permission of the Bank of Little Rock, Alphin & Lake took these bills of lading and borrowed money on them from the German National Bank, defendant in error. On January 19, 1903, from six to eight weeks after the cotton was shipped, the German National Bank presented the bills of lading to the railway company at Eldorado and demanded the cotton, and not having received it, instituted this suit in the Circuit Court of Union County, Arkansas, to recover its value. (Printed Trans., 35, 10.)

VII.

The complaint consists of 19 counts, based on the various shipments, it being alleged that the defendant received certain shipments of cotton from the Bank of Bernice at Bernice, Louisiana, to transport over its road to the order of said Bank at Eldorado, Arkansas. Copies of the bills of lading were attached. Each paragraph of the answer admits the execution of the bill of lading set forth in the corresponding count of the complaint, but denies that the defendant agreed to deliver the cotton to the order of the Bank of Bernice, and alleges that the defendant agreed to deliver the cotton to the compress company as the agent for the holder of the bill of lading in case the holder of the bill of lading did not present the same and demand the cotton on its arrival at Eldorado. An amendment to the answer set forth the foregoing stipulation of the bill of lading and alleged performance in accordance therewith. A second amendment to the answer contained the same allegation and alleged in addition a custom at Eldorado to deliver cotton in such manner and also that the compress company was a responsible public warehouse. (Printed Trans., 10-20.)

VIII.

At the trial in the Circuit Court of Union County, Arkansas, testimony was introduced both by the bank and by the railway company, and at the conclusion of all the evidence, the trial court directed the jury to return a verdict in favor of the plaintiff upon each bill of lading sued on, and the jury under this instruction found for the plaintiff in the sum of $39,025.10, for which judgment was rendered accordingly. On appeal to the Supreme Court of the state this judgment was affirmed (Printed Trans., 91, 94, 100), and the railway company sues out this writ of error to reverse said judgment.

The judgment of the court below bases the liability of the railway company upon the section of the statute above quoted, and it is the contention of the plaintiff in error that said statute, as applied to the shipments of cotton in controversy, is void as a regulation of interstate commerce.

SPECIFICATION OF ERRORS.

I.

The Supreme Court of Arkansas erred in holding and deciding that Sections 530 and 531 of Kirby's Digest of the Statutes of Arkansas were valid as applied to each of the bills of lading sued upon in this action.

The validity of said sections was denied and drawn in question by the defendant railway company on the ground of their being repugnant to that part of Section 8, Article I, of the Constitution of the United States vesting in Congress the power "to regulate commerce with foreign nations and among the several states, and with the Indian tribes."

II.

The Supreme Court of Arkansas erred in not holding and deciding that Sections 530 and 531 of Kirby's Digest of the Statutes of Arkansas were invalid as applied to each of the bills of lading sued upon in this action representing cotton shipped from Louisiana to Arkansas.

The validity of said sections was denied and drawn in question by the defendant railroad company on the ground of their being repugnant to that part of Section 8, Article I, of the Constitution of the United States vesting in Congress the power "to regulate commerce with foreign nations and among the several states, and with the Indian tribes."

III.

The Supreme Court of Arkansas erred in holding and deciding that Sections 530 and 531 of Kirby's Digest of the Statutes of Arkansas were applicable to each of the bills of lading sued upon in this action.

The validity of said sections as applied to each of the bills of lading sued upon in this action was denied and drawn in question by the defendant railroad company on the ground of their being repugnant to that part of Secton 8, Article I, of the Constitution of the United States vesting in Congress the power "to regulate commerce with foreign nations and among the several states, and with the Indian tribes."

IV.

The Supreme Court of Arkansas erred in holding and deciding that the trial court did not err in giving the instruction requested by the plaintiff bank in words and figures as follows:

> "The court instructs the jury that the plaintiff is entitled to a verdict upon each bill of lading sued upon."

For the reason that said instruction is repugnant to that part of Section 8, Article I of the Constitution of the United States vesting in Congress the power "to regulate commerce with foreign nations and among the several states, and with the Indian tribes," and the statutes of the United States enacted thereunder.

V.

The other assignments of error in the record (pp. 2, 3, and 4) are not set out here, because each of them involves the federal question above stated, and it is not thought necessary to copy them here.

BRIEF.

I.

THE TRIAL COURT HAVING DIRECTED A VERDICT FOR PLAINTIFF, THE SOLE QUESTION PRESENTED UPON APPEAL IS WHETHER, GIVING THE DEFENDANT THE BENEFIT OF THE MOST FAVORABLE VIEW OF THE EVIDENCE, AND ALL INFERENCES FAIRLY AND REASONABLY TO BE DRAWN THEREFROM, THE PLAINTIFF IS ENTITLED TO RECOVER.

Overton v. *Matthews*, 35 Ark., 147.

Catlett v. *St. L. I. M. & S. R. Co.*, 57 Ark., 461; 21 S. W., 1062.

Boyington v. *Van Etten*, 62 Ark., 63; 35 S. W., 622.

Mt. Adams & E. P. Inclined R. Co. v. *Lowery*, 74 Fed., 463.

Mason & O. R. Co. v. *Yockey*, 103 Fed., 265.

Williams v. *Choctaw, O. & G. R. Co.*, 149 Fed., 104.

Kane v. *Nor. Cent. R. Co.*, 128 U. S., 91.

Jones v. *East Tennessee, V. & G. R. Co.*, 128 U. S., 443.

Dunlap v. *Northeastern R. Co.*, 130 U. S., 649.

Gunther v. *Insurance Co.*, 134 U. S., 110.

Louisville, etc., R. Co. v. *Woodson*, 134 U. S., 614.

Texas & Pac. R. Co. v. *Cox*, 145 U. S., 593.

Marande v. *Texas & Pac. R. Co.*, 184 U. S., 173.

II.

SECTION 530 OF KIRBY'S DIGEST, AS APPLIED TO THESE INTERSTATE SHIPMENTS, IS VOID AS A REGULATION OF INTERSTATE COMMERCE.

(1) The shipments of cotton involved in this suit were interstate commerce until actual delivery to the consignee.

Brown v. *Maryland*, 12 Wheat., 419.
Case of the State Freight Tax, 15 Wallace, 232.
Brown v. *Houston*, 114 U. S., 622.
Coe v. *Errol*, 116 U. S., 517.
Bowman v. *Chicago & N. W. R. Co.*, 125 U. S., 465.
Leisy v. *Hardin*, 135 U. S., 100.
Pittsburg, &c., Coal Co. v. *Bates*, 156 U. S., 577.
Rhodes v. *Iowa*, 170 U. S., 412.
Vance v. *Vandercook Co.*, 170 U. S., 438.
Kelly v. *Rhoads*, 188 U. S., 1.
Heyman v. *Southern R. Co.*, 203 U. S., 271.

(2) The statute of Arkansas, as applied to the facts in this case, is a regulation by the State of Arkansas upon a subject-matter which is national in character and requires uniformity of regulation.

Cooley v. *Board of Wardens*, 12 How., 299.
Hall v. *De Cuir*, 95 U. S., 485.
Gloucester Ferry Co. v. *Pennsylvania*, 114 U. S., 196.
Wabash, etc., R. Co. v. *Illinois*, 118 U. S., 557.

Covington, etc., Bridge Co. v. *Kentucky,* 154 U. S., 204.
Rhodes v. *Iowa,* 170 U. S., 412.
Central Stock Yards Co. v. *Louisville & N. R. Co.,* 118 Fed., 113.
Smith v. *Alabama,* 124 U. S., 465.
Nashville, C. & St. L. R. Co. v. *Alabama,* 128 U. S., 96.
Hennington v. *Georgia,* 163 U. S., 299.
New York, etc., R. Co. v. *New York,* 165 U. S., 628.

(3) The Arkansas statute is not of that class of state legislation which has been upheld by this court as merely expressive of the common law liability of carriers.

Railroad Co. v. *Fuller,* 17 Wall., 560.
Sherlock v. *Alling,* 93 U. S., 99.
W. U. Tel. Co. v. *James,* 162 U. S., 650.
Richmond & A. R. Co. v. *Patterson Tobacco Co.,* 169 U. S., 311.
C., M. & St. P. R. Co. v. *Solan,* 169 U. S., 133.
Missouri, K. & T. R. Co. v. *McCann,* 174 U. S., 580.
Penn. R. Co. v. *Hughes,* 191 U. S., 477.

(4) The statute imposes a direct burden upon interstate commerce.

(a) The effect of the statute is to place an actual burden upon the carrier with respect to every interstate shipment which it transports.

Gloucester Ferry Co. v. *Pennsylvania,* 114 U. S., 196.

Minnesota v. *Barber*, 136 U. S., 313.
Brimmer v. *Rebman*, 138 U. S., 78.
Voight v. *Wright*, 141 U. S., 62.
McNeill v. *Sou. R. Co.*, 202 U. S., 543.

(b) The character of the act as a regulation of interstate commerce is not affected by the provision exempting from its operation bills of lading having the words "not negotiable" stamped on them.

W. U. Tel. Co. v. *Pendleton*, 122 U. S., 347.
Bowman v. *Chicago & N. W. R. Co.*, 125 U. S., 465.
Louisville & N. R. Co. v. *Eubank*, 184 U. S., 27.
Cent. of Georgia R. Co. v. *Murphey*, 196 U. S., 194.
Houston & Tex. Cent. R. Co. v. *Mayes*, 201 U. S., 321.

(5) The Arkansas statute is void because it conflicts with the will of Congress, as expressed in the act to regulate commerce, approved February 4, 1887.

Am. Warehouseman's Assn. v. *Ill. Cent. R. Co.*, 7 Int. Com. Rep., 556.
Penn. Millers' State Assn. v. *Phila. & R. R. Co.*, 8 I. C. Rep., 531.
Palmer's Dock Hay & Produce Board of Trade v. *Penn. R. Co.*, 9 I. C. Rep., 61.
Blackman v. *Sou. R. Co.*, 10 I. C. Rep., 352.
Miner v. *New York, etc., R. Co.* 11 I. C. Rep., 422.

Cattle Raisers' Assn. v. *C. B. & Q. R. Co.*, 11 I. C. Rep., 277.

Fielder v. *M. K. & T. R. Co.* (Tex. Civ. App.), 42 S. W., 362.

Gulf, C. & S. F. R. Co. v. *Hefley*, 158 U. S., 98.

Int. Com. Com. v. *Detroit, etc., R. Co.*, 167 U. S., 633.

ARGUMENT.

I.

THE TRIAL COURT HAVING DIRECTED A VERDICT FOR PLAINTIFF, THE SOLE QUESTION PRESENTED UPON APPEAL IS WHETHER, GIVING DEFENDANT THE BENEFIT OF THE MOST FAVORABLE VIEW OF THE EVIDENCE AND OF ALL INFERENCES FAIRLY AND REASONABLY TO BE DRAWN THEREFROM, THE PLAINTIFF IS ENTITLED TO RECOVER.

At the outset we desire to emphasize the fact that the trial court directed a verdict in favor of the plaintiff upon each of the bills of lading sued upon, and the only question passed upon, therefore, by the Supreme Court of Arkansas was the question of law presented by the giving of this peremptory instruction.

In order to ascertain the nature and scope of this question it will be necessary to review some portions of the testimony offered at the trial, observing meanwhile that in Arkansas, as elsewere, a motion to direct a verdict is only allowed when, giving the opposite party the benefit of every reasonable inference that can be drawn from the testimony, the verdict still must go against him. As Judge ENGLISH said in *Overton* v. *Matthews,* 35 Ark., 147:

> "Such (peremptory) instructions should not be given, except in cases where there is no evidence to sustain the cause of action or defense, and the court can say so *as a matter of law.*"

We ask the indulgence of the court, therefore, while we discuss certain features of the testimony.

Alphin & Lake were cotton merchants at Eldorado, having been engaged in that business several years prior to the shipments involved here. They also were the owners of the cotton compress at that point, situated adjacent to the railway company's tracks, and E. H. Lake, a member of the firm, was president of the compress company. Eldorado was the terminus of the railroad company's line, and all the cotton shipped into Eldorado over the railroad was consigned to Alphin & Lake, care of the compress company, as was all the cotton in the compress. (Printed Trans., 72, 79, 80.)

For three years prior to the shipments in question all cotton consigned to Eldorado over the railway company's line had been delivered to the compress. Some of it was consigned "Shipper's Order," and some of it was consigned to Alphin & Lake direct. There was no other place at Eldorado for the storage of cotton, and the railway company, whose line was only a hundred miles in length, had no warehouse of its own for storing cotton.

When the cotton arrived at Eldorado the railway company, within two or three days after arrival, placed the cars containing it upon the compress track, and it was unloaded into the compress, the compress company receipting for it in a little book containing the car numbers and the number of bales, which were taken from the way bills. This was in accordance with directions given by E. H. Lake, president of the compress company. There was at all times enough cotton in the compress to protect all of the railway company's bills of lading. (Printed Trans., 72, 73.) Lake

paid the freight on the cotton, the railway agent at Eldorado drawing on him at Little Rock for the amount, in accordance with Lake's instructions. Bills of lading for cotton delivered to the compress were afterwards turned over to the railway company by Lake, or by the assistant manager of the compress. (Printed Trans., 67, 68.)

E. H. Lake resided in Little Rock and did business with the Bank of Little Rock. All cotton purchased at Bernice, Louisiana, was handled through the Bank of Bernice, at that place, which had advanced money on it, usually in small amounts. The Bank of Bernice would take the bills of lading as they were issued, and draw upon Lake at the Bank of Little Rock for the amount Lake owed it upon the cotton covered by the bills of lading. (Printed Trans., 47, 48, 49.) The Bank of Little Rock, with knowledge of all the facts as to the ownership and handling of the cotton, would honor Lake's check to protect these drafts, carrying Lake's account in the form of an overdraft, with the bills of lading as security. The cashier of the Bank of Little Rock was treasurer of the compress company. At times Lake was indebted to the Bank of Little Rock for more than a hundred thousand dollars advanced in this manner. (Printed Trans., 87.)

The Bank of Bernice had no one on hand at Eldorado to receive the cotton as it arrived there, and paid no attention to the handling of the cotton after it left Bernice. It forwarded all bills of lading to the Bank of Little Rock, sometimes sending them as they were issued, and sometimes holding them until a number would accumulate, and then forwarding them in a

batch. Bills of lading were sometimes held this way seventeen or eighteen days. The Bank of Bernice, the consignor, and the party to whose order the cotton was consigned, never at any time made demand on the railway company for the cotton. (Printed Trans., 49-53.)

The bills of lading usually were received by the Bank of Little Rock the next day or the second day after they were forwarded by the Bank of Bernice, and the Bank of Little Rock held them as security for the payment of Lake's indebtedness to it. (Printed Trans., 85, 87.) The Bank of Little Rock never at any time while the bills of lading were in its possession made demand on the railway company for the cotton. (Printed Trans., 42.)

About December 6, 1903, Lake's overdraft at the Bank of Little Rock being heavy, the bank requested him to reduce it. (Printed Trans., 84, 88.) Accordingly, Lake, with the permission of the bank, took certain of the bills of lading sued on here, aggregating 558 bales, and went to the German National Bank to raise money on them. He secured a loan upon his note with the bills of lading as security, and deposited the proceeds to his credit in the Bank of Little Rock. This was December 6,—two weeks after the first shipment of the cotton involved here—and Lake delivered to the German National Bank that day bills of lading for 558 bales of cotton. On December 11 Lake got another loan from the German National Bank, depositing as security therefor bills of lading for 441 bales of cotton which he had obtained from the Bank of Little Rock in the same way. (Printed Trans., 26.) At the

date the German National Bank acquired the bills of lading involved in this suit, therefore, the cotton covered by those bills had been at destination from fourteen to nineteen days. At the time of the negotiations for these loans Lake informed the German National Bank that he wished to raise the money to take up drafts made upon him through the Bank of Little Rock by the Bank of Bernice. (Printed Trans., 27.)

The German National Bank made no inquiry about the cotton, had no representative at Eldorado to receive the cotton, and did not present the bills of lading and demand same until January 19, 1903. (Printed Trans., 35.) At that time Alphin & Lake had failed. The cotton had been at Eldorado from six to eight weeks.

We observe here that under the foregoing facts and the decisions of the Arkansas Supreme Court, neither the Bank of Bernice, nor Alphin & Lake, nor the Bank of Little Rock could recover against the railway company.

Nebraska Meal Mills v. *St. L. S. W. R. Co.*,
64 Ark., 169; 41 S. W., 810.

And had it not been for the application of the Arkansas statute quoted above, a jury might have found, and probably would have found, that the German National Bank, acquiring bills of lading that showed on their face that they were two or three weeks old, and containing a valid stipulation that if the cotton was not called for by consignee within twenty-four hours after arrival it would be put in store at owner's risk, accepted these bills of lading with full knowledge of the facts as to the delivery of the cotton and full assent

to the terms of the bills of lading, placing its faith in Alphin & Lake and not in the railway company. Or the jury might have found that the railway company, inserting such a provision in its bill of lading, gave notice to each transferee of the bill of lading that if the cotton was not called for within twenty-four hours after arrival at destination, it would be put in store at owner's risk; and that the railway company, having transported the cotton and placed it in store, had complied with its contract and performed all that it had undertaken to perform. These propositions were presented to the court by defendant's instructions, which the court refused. (Printed Trans., 91-93.)

But giving a peremptory instruction upon such evidence amounts to a declaration that the stipulation in the bills of lading was void, because the statute made it so; and this presents the only question raised in this court, that the statute itself, as applied to these shipments is void as a regulation of interstate commerce.

We remark also that no finding of facts was made or could be made in the Supreme Court of Arkansas. The sole question presented there, as it is the sole question presented here, was the effect of the statute, the court holding that the effect of the statute was to deprive the defendant of the benefit of its contract, which we maintain would otherwise be a complete defense.

That this must be so will more clearly appear from an analysis of the propositions of law thus presented.

Independent of the statute, judgment should have gone for plaintiff in error in the event the evidence

showed conclusively *any one* of the following facts to be true:

(a) That delivery was made in accordance with the terms of the bills of lading.

(b) That the cotton was stored at the risk of the owner, in accordance with the stipulation in the bills of lading giving the plaintiff in error the right so to store, unless called for within twenty-four hours.

(c) That the cotton was delivered to the compress or to Alphin & Lake, in the manner in which it was delivered, with the full knowledge and consent of the then holder of the bills of lading.

Independent of the statute, the case should have gone to the jury, if by giving the plaintiff in error the benefit of all reasonable inference from the evidence, the jury could have found any one of the following allegations to be true:

1. That the cotton was delivered in accordance with the terms contained in the bills of lading.

2. That the cotton was delivered to the compress for the account of the Bank of Bernice, or its assigns.

3. That the cotton was stored with the compress company per stipulation in bills of lading giving the right of storage.

4. That the cotton was stored at the compress under plaintiff in error's right to so store at common law at the risk of the owner, for failure of the owner to receive same upon arrival and remove same within a reasonable time.

5. That the cotton was delivered to the compress company in the manner and at the time it was so delivered with the full knowledge and consent of the then holders of the bills of lading.

Can this court indulge in the presumption that the courts of Arkansas upon the record in this case held that there was no such conflict in the evidence upon any of the foregoing as to entitle the plaintiff in error to have had the same submitted to the jury? Again, we submit that such presumption is palpably untenable, and that the only conclusion possible is that the state courts held that no matter what the evidence on these issues, or on any one of them, or what the jury might have found, the plaintiff in error could not be relieved from its liability because it did not procure the surrender of the bills of lading before parting with the cotton as required by the statute.

Moreover, it was the contention of counsel for defendant in error, both in the trial court and the Supreme Court, that the effect of the Arkansas statute is as we have above stated the courts held it to be: namely, that it precludes the right of a carrier *to contract* to relieve itself from liability by storage or the right to relieve itself from liability by storage *as at common law,* so long as the bills of lading remain outstanding. That this was the contention of counsel, is shown by the following, which we quote from pages 35 and 36 of their brief in the Supreme Court of Arkansas:

> "It seems to us clear that if the words 'care of compress' have the meaning in the bills of lading contended for by counsel for appellant, they are in direct violation of the statute and void. They are in direct violation of section 527, which for-

bids the railroad to permit the cotton 'to be shipped, transferred or removed *beyond its control*, without the written assent of the person or persons holding such receipts;' and of section 530, which provides that the cotton shall not '*be delivered except on surrender and cancellation of such receipts and bills of lading.*'

"The language of the statute is too plain to leave any room for construction. The statute is one of the most important enactments of the legislature. Bills of lading and warehouse receipts are the most important factors in the business and commercial affairs of the country. Without the free use of them as security, transactions among the banks and dealers would be greatly impeded, and the products and merchandise of the country could not be handled advantageously. It was evidently the intention of the legislature to make this statute so rigid and so plain, that the holder of a bill of lading could feel perfectly secure in taking it, and that it could not be misunderstood or evaded by the carrier.

"The statute entered into and became a part of the contract. By the bill of lading construed in the light of the statute, as well as by the provision to shipper's order, the railroad said to the holder of the bill of lading, 'We will not in any manner *remove, or permit to be shipped, transferred or removed beyond our control*, the cotton, without your *written* consent. Nor will we deliver the cotton *except on surrender and cancellation of the bill of lading.*'

"The right of the holder of the bill of lading does not depend merely upon the right of the assignor. But he has the right to assume that so long as the *bills of lading are outstanding*, the carrier has the possession of the property and that it *will not be surrendered except upon production and cancellation of the bill of lading by the holder thereof.*"

That this was likewise the theory upon which the

verdict was directed by the trial court will conclusively appear from a perusal of the following evidence bearing upon the question of delivery, being all the evidence thereon. We ask the indulgence of the court while we set it out. The quotations are from the printed transcript, beginning at page 60:

"Q. Just state to the jury in your own way what was done with the cotton in controversy when it got here?

A. It was delivered to the compress as soon as it was received.

Q. I refer to the cotton covered by the bills of lading introduced here; state what was done with all that cotton; was it all delivered to the compress?

A. As far as I know it was.

(Then follows in the transcript to page [illegible] he testimony of the witness Hutchinson as t[illegible]te of delivery of each particular car of cotton in controversy.)

(p. 63:) Q. In what way were those receipts taken by the railway company from the compress?

A. This book is all I had.

Q. How did you manage the book—did you send the book over to the compress? Where was that book kept?

A. In my office and part of the time at the compress.

Q. When was it sent over to the compress, with the cotton or after it was received?

A. After it was received; we write it up and then send it over to the compress.

Q. What was the usual custom of the compress with reference to reporting any shortage?

A. If there was any shortage they were to report it before they unloaded it and we would send a man over to check it up.

Q. Why did you deliver the cotton to the Eldorado compress?

A. It was billed that way.

Q. Do you mean by that it so stated in the bill of lading?

A. It did in the way bill; I did not see the bill of lading; I suppose that was taken from the bill of lading.

Q. Had you also seen bills of lading that were in use and know how they were being made out?

A. Yes, sir.

Q. And the way bill showed you how the cotton was billed?

A. Yes, sir.

Q. You saw from it that it was billed in care of the compress?

A. Yes, sir.

Q. How did you get these bills of lading?

A. Mr. Lake would send them to me and some were given to me by the compress people.

Q. Who was in charge of the compress at Eldorado?

A. Mr. J. P. Wright, I believe.

Q. What position did he occupy at the compress?

A. Manager.

Q. What position did Mr. Lake occupy with reference to the compress?

A. President.

Q. Was it your understanding or not that the cotton turned over to the compress was to be delivered by the compress company to any one before these bills of lading were returned?

A. No, sir; not to be delivered until the bills of lading were taken up.

(Objected to by plaintiff; objection sustained by court and defendant excepts.)

Q. State what requests you made of the compress people for bills of lading from time to time?

A. I asked them from time to time if they had any bills of lading.

Q. Did they deliver you bills of lading from time to time?

A. Yes, sir.

Q. Was the Eldorado compress a place that was well known here?

A. Yes, sir.

Q. How long had the Arkansas Southern Railroad Company been delivering cotton in this way and storing or delivering it to the Eldorado Compress Company, for what length of time?

(Objected to by plaintiff; objection sustained by the court, and defendant excepts.)

Q. Had it been the general custom of the defendant company since the time the compress was built here at Eldorado, as much as three years ago, to store cotton at the compress for the benefit of the holder of the bill of lading?

(Objected to by plaintiff; objection sustained by the court, and defendant excepts.)

Defendant offered to prove by this witness that it had been the usual custom and usage at this place for the past three years for the cotton shipped on the Arkansas Southern Railroad to Eldorado to be delivered to the compress for the benefit of the holder of the bill of lading and that this usage was well known at this place; which the court refused to permit and to which ruling of the court defendant excepted.

Cross-Examination.

(p. 65:) Q. Did the Arkansas Southern Railroad Company deliver cotton that came in on its road to Eldorado at any other place than the Eldorado compress?

A. No, sir.

Q. Did it have any other place for delivery?

A. No, sir.

Q. You have testified in reference to the cotton that came in over the Arkansas Southern Railroad in the case pertaining to the affairs of the Alphin-Lake Cotton Company in bankruptcy?

A. Yes, sir.

Q. For whose account was all the cotton that

came in over the Arkansas Southern Railroad to Eldorado bought?

A. It was delivered to the compress company as billed.

Q. For whose account was it delivered?

A. For both; they would bring the bills of lading.

(The answer of the witness does not appear to have been correctly transcribed, or else the witness misapprehended the question.)

Q. Did you not state in the Alphin-Lake Cotton Company matter it was delivered there for the account of the Alphin-Lake Cotton Company?

A. I think not.

Q. Did you not state as follows: 'The statement here as to amounts paid on incoming freight over the Arkansas Southern Railroad does not show the number of bales, do you know anything about the number of bales?' to which you answered, 'No; because the Arkansas Southern has no waybills and I could not give you the amount of them.' Did you state that?

A. Yes, sir; that is correct.

Q. Did you make this statement in answer to the following question: 'Most of the cotton coming in over the Arkansas Southern Railroad went into the compress?' to which you answered, 'Yes'?

A. I stated that.

Q. 'It went then to Alphin & Lake's account?'

A. If I remember right all the cotton billed to the Alphin-Lake Cotton Company went to the compress; if I remember right all was billed that way.'

A. Yes, sir; I stated that.

Q. Did you not make the following answers to the following questions: 'Q. Did not most of the cotton billed over the Arkansas Southern Railroad go into the compress? A. All that came over the Arkansas Southern Railroad went into the compress. Q. Was it not all billed to Alphin & Lake that went in there? A. Yes, sir'?

A. It went in there the way it was billed.

Q. Did you make the following answer to the following question: 'Q. All that came in over the road and went into that compress was billed to them?' 'A. Yes, sir.' That is true?

A. Yes, sir.

Q. Did you make the following answer to the following question: 'Q. And went in to their account there?' 'A. Yes, sir; I suppose so.' Was not that the way you answered it?

A. I suppose it was.

Q. You were better informed then and it was fresher in your mind?

A. Yes, sir."

Witness further states that each Monday he drew drafts on Alphin-Lake Cotton Company for the freight on cotton, which were paid in each instance except for one car which he had to pay himself.

"Q. In delivering the cotton to the compress company were there any other directions given to them than that contained in this little book you have?

A. No, sir; I think not.

Q. Nothing was ever said about it in any other way?

A. No, sir.

Q. You just delivered it there by that little book and that was all that passed between you?

A. Yes, sir. I asked the compress several times if they had bills of lading and several times they turned them over.

Q. It was always expected by you that Lake would produce to you the bills of lading?

A. Yes, sir.

Q. *Did you ever require the compress company or anyone to deliver you a bill of lading when you delivered the cotton to the compress company?*

A. *Not at the time it was delivered. No, sir. But the compress company knew the cotton was not to go out until the bill of lading was turned in.*

Q. *How did they know that?*

A. *Mr. Lake was president of the compress and Mr. Wright had been getting bills of lading and giving them to me.*

Q. *Did you not know cotton was going out without bills of lading being produced?*

A. No, sir; we had it going in and coming out all the time and I had supposed there was enough there to cover that.

Q. You were looking to Lake for that?

A. Yes, sir.

Q. You gave no directions to them not to let the cotton go out without bills of lading?

A. No, sir.

Q. You never demanded these bills of lading of the compress company when the cotton went in there?

A. No, sir.

Q. Mr. Wright brought you some bills of lading afterwards?

A. Yes, sir.

Q. That, then, is why you say the compress company knew that—was it not going out without bills of lading being produced?

A. Yes, sir.

Q. But you were looking to Lake all the time for that?

A. Yes, sir."

Witness testified that there were bills of lading issued at Little Rock by the Iron Mountain Railway Company to be shipped from Eldorado for more cotton than was on hand, but he did not know at any time nor believe that there was not enough of cotton in the compress to cover the shipments on the Arkansas Southern. The answers of the witness in which he spoke of counting the cotton several times to ascertain whether or not there was enough on hand to cover bills of lading is all in reference to Iron

Mountain bills of lading and is not material to the matter in controversy.

Re-direct examination (p. 70):

Q. At the time that cotton came in over the Arkansas Southern to Eldorado, you had the waybills before you?

A. Yes, sir; the waybills came in with the cotton. When I stated that the Arkansas Southern had no waybills I meant that I had turned them over to the officials of the Arkansas Southern and did not have them in my possession.

Q. Explain to the jury what you meant in each of your answers when you said (in the bankruptcy case) the cotton was billed to the Alphin & Lake Cotton Company?

A. The waybill we received was billed care of the compress, notify Alphin-Lake Cotton Company.

Q. What you meant was that they were the parties named in the waybill to be notified?

A. Yes, sir.

Q. What did you mean by this answer: 'Q. Was not it all billed to Alphin & Lake that went in there? A. I understood it was billed that way.' What do you mean by being billed?

A. The waybills I received.

Q. What did the waybills say?

A. Care of the compress, notify Alphin-Lake Cotton Company.

Q. Counsel asked you if you did not state in that examination before Major Sevier (bankruptcy case) this: 'And went in there (meaning cotton that went into the compress) to their account' and you were asked if you did not answer, 'Yes, I suppose so'; do you remember making that answer to that question?

A. No, sir; I do not remember.

Q. You do not remember the question to have been asked and you do not remember answering it?

A. No, sir.

Q. If that question was asked and that answer was made by you what impression did that make on your mind?

(Objected to by plaintiff; objection sustained by the court, and defendant excepts.)

Q. What meaning did you intend by that answer?

(Objected to by plaintiff; objection sustained by the court, and defendant excepts.)

Q. At that examination (in bankruptcy) were you asked the question, 'Did you require the surrender of the bills of lading before delivering the cotton to the compress?' and did you answer, 'No'?

A. Yes, sir; I think I did.

Q. Were you asked this question, 'Why not?' and did you answer, 'Because Mr. Lake had sent them down to me very promptly and I supposed the compress company was responsible for the cotton'?

A. Yes, sir.

(Objected to by plaintiff; objection sustained by the court and defense excepts.)

* * * * *

Re-cross Examination (*p.* 73).

"Q. Is it not true that the cotton was unloaded into the compress for the purpose of compressing?

A. Yes, sir."

Witness was examined as to whether or not he wrote the letters "S.O" in the compress book, a copy of a page from which appears in the transcript at page 109. Witness answered, "It looks like my writing all the way through and I will not say I did not do it."

(p. 77):

"Q. Is this your writing?

A. No, sir.

Q. Is that?

A. Yes, sir. I may have put that in there; I cannot say whether or not I did.

Q. You mean you may have wrote 'Shipper's Order' in?

A. Yes, sir."

Witness also stated that he did not know how "Shipper's Order" was put opposite these first cars. Also, that the letters "S.O" appeared to be written in a different handwriting and a lighter writing and with a lighter pencil than the original memoranda made in the book. Also, witness testified that he did not know whether the letters "S.O." had been written in the book at the time Wright signed for the cotton.

This appears to be all of the testimony of the witness Hutchinson which is material on this question.

The witness, J. P. Wright, for appellee, as to this question, testified as follows (see p. 80):

"Q. For whose account did all the cotton delivered at the compress company by the Arkansas Southern Railroad Company go?

A. For the Alphin-Lake Cotton Company."

It will be noted here that the witness does not say that the cotton was delivered by the railroad company to the account of the Alphin-Lake Cotton Company.

Witness does not state that the railway company directed the cotton to go to the Alphin-Lake Cotton Company.

"Q. What instructions, if any, did you receive from the Arkansas Southern Railroad Company or its agents in reference to the person for whose account the cotton delivered to the compress by the Arkansas Southern Railway Company was to be held?

A. I received no instructions regarding the

> cotton that was put into the side track; it was always supposed to belong to the Alphin-Lake Cotton Company and was to be unloaded at once."

We submit from the above evidence and statement by counsel of appellee as to the effect of the Arkansas statute that it is impossible to come to any other conclusion but that the trial court held that the Arkansas statute has the effect of depriving an interstate carrier of its right to relieve itself from liability, either by express contract giving it the right to store the goods at destination, or by virtue of its common law right so to do, without first procuring a surrender of the bills of lading.

Coming now to the decision of the Supreme Court of Arkansas, it is to be observed that nowhere in the opinion of the court is it stated or even intimated that there was no conflict in the evidence upon any of the issues stated which would have been determinative of the liability or non-liability of plaintiff in error in the absence of the statute, although whether or not there was such a conflict was one of the principal questions argued before it.

On the contrary, the dissenting opinion expressly states that upon such issues there was a conflict in the evidence. We submit that the silence of the opinion of the court upon a question directly presented to it, taken with the positive assertion of one member of the court upon that question indicates that the majority opinion of the court was predicated upon the theory that by reason of the statute it was immaterial whether the plaintiff in error had stored the cotton in accordance with directions contained in the bills of

lading or by virtue of its contract right so to do, or whether it had delivered in manner as it had with the knowledge and consent of the holder of the bills of lading, and that consequently it had no right to have such question submitted to the jury.

Again the Supreme Court says:

> "Appellant failed to deliver the cotton on the surrender and cancellation of the bills of lading issued therefor, *and under the statute of this state is liable to the appellee for damages.*"

Justice McCulloch, in his dissenting opinion, speaking of the effect of the statute, says:

> "The language of the contract, was in effect a selection in advance by the consignee of a place of delivery and the designation of an agent to accept the delivery for him. The consignee cannot complain because the carrier delivered the cotton at the place and to the agency designated, without requiring a surrender of the bill of lading, *nor can the assignee of the consignee complain unless the statute quoted in the majority opinion prohibits a delivery by the carrier, under the circumstances of this case, without requiring a surrender of the bill of lading.* I do not think that the statute in question has any application to the facts."

Why, we ask, did the court hold that under the statute plaintiff in error was liable, and why did the judge writing the dissenting opinion say that the plaintiff was not liable under the statute, unless the statute prohibited a delivery in any event without surrendering the bills of lading, unless the court gave expression to exactly what was in its mind, notwithstanding it may not have made as clear an expression of its mind as could have been done, namely, that no matter what the evidence or how conflicting the evidence, plain-

tiff in error was liable for a delivery under any circumstances without requiring a surrender of the bills of lading? We quote again from the dissenting opinion:

> "The plaintiff manifestly relied upon the force of the statute in prohibiting a delivery without surrender of the bills of lading, and not upon any negligence of the carrier in delivering to the compress company without notice of the nature of the consignment."

We submit that it must be apparent to this court that the defendant in error assumed the statute of Arkansas to have the effect which we contend the courts gave it. Can the defendant in error justify its own conduct on any other theory? It advanced over $37,000 upon bills of lading which provided for the carriage of cotton only 30 miles distant. It held the bills of lading from six to eight weeks thereafter and gave no notice to anyone that it was the owner and holder thereof. For the bank to say that it did not construe the statute to prohibit a delivery or storage without a surrender of the bills of lading is to say that it deliberately advanced $37,000 and then took no means or precaution whatsoever to look after or care for the security therefor in the face of an express stipulation in the bills of lading that if not called for within 24 hours, same would be disposed of at its risk. Is it reasonable to presume that the bank proceeded on the theory that the cotton had been turned over to somebody at its risk, when during all that time it did not even inquire therefor or make any provision for the conservation or insurance thereof?

We desire to call the court's attention to the status

of the compress company, and submit that the duty resting upon that company in regard to the cotton in question was the same as rested upon plaintiff in error and that the manner of doing business constituted the compress company a link in the interstate transportation of the cotton. We invite the court's attention and request a thorough reading of the case of *Atlanta National Bank* v. *Southern Railway Company*, 106 Fed. Rep., 623, where the relative rights and duties of a railroad company, a compress company and a shipper, who shipped over the line of the railway company, in care of a compress company, are fully discussed, and from which we quote the following, page 634:

> "The bills of lading in evidence show that the cotton in question was sent care of Bell Street Compress, Atlanta, Ga. The Bell Street Compress is made, by the bills of lading, the waybills, and these manifests, a part of the route over which this cotton was to be transported. The managers of the compress accepted the cotton, accompanied by these manifests, which expressly placed the cotton in their care, and with the statement thereon that it was to be delivered to 'order notify,' which, as has been indicated, was a direct notice that the consignees, Hamilton, Gibson & Leake, were not the proper parties to whom the cotton should be delivered in the absence of the bills of lading. The compress company made of itself, by the character of its business and by the manner in which this cotton was received, so much a part of the system transporting the cotton that it is impossible to escape the conclusion that there was a duty on its part to protect the holders of the bills of lading, who were the real owners of the cotton.
>
> "The case is entirely without precedents. At

> least, I have not been shown, and have been unable to find, any case making the precise question. But it seems to me clear that there was a duty on the part of the compress to see that this cotton was properly delivered. When the compress people accepted the cotton, accompanied by the manifests, which indicated a particular duty by all who handled the cotton with reference to the same, they must have undertaken to discharge such duty. Even conceding that, as a compress, there was no common law duty with reference to the cotton on the part of the compress company, still, when it made itself, by the character of its business and by the acceptance of the cotton routed through it, by the terms of the bills of lading, a link in the route over which the cotton must pass, it must, it seems to me, have assumed such duty as the law imposed upon all connected with its carriage from the original point of shipment to its destination. The reading of this record, showing the relation of compress companies to the matter of carriage of cotton by railroads, leads to the inevitable conclusion that there is such a close relation and connection between compression and carriage as puts an imperative duty on compress companies to see that cotton is not diverted from the direction given it in the bills of lading."

In this connection we call attention to the very interesting decision of the Interstate Commerce Commission in the matter of Alleged Unlawful Rates and Practices in the Transportation of Cotton by the Kansas City, Memphis & Birmingham Railroad Company and others, 8 I. C. Rep., 121-141, which throws some light upon the functions performed by compresses in the South in the movement of the great cotton crops during the fall and winter months, of which Justice McCulloch in his dissenting opinion says:

> "In fact it is a feature of the transportation in the handling of cotton sufficiently notorious for us to take knowledge of it, that railroads do not provide warehouses for cotton at points of destination, but that this feature of the business is taken care of by other concerns owning and operating compresses and storage warehouses at intermediate and terminal points."

We submit, therefore, that the contention that the courts of Arkansas arrived at the judgment entered without giving to the Arkansas statute the effect which we contend they gave it, is so palpably unfounded as to require a denial of such contention by this court, and we further submit that said statute, when construed to deprive an interstate carrier, exercising, in connection with an interstate shipment, of its common law right of releasing itself from further liability by storage, or its right to contract as to the conditions under which the same shall be stored, upon arrival at destination, is unconstitutional and a burden upon interstate commerce and clearly condemned by the authorities of this court, as hereinafter shown in our brief.

That the courts of Arkansas did give to the statute the effect here contended for is further demonstrated by a reading of instructions two, three, four, five, seven, eight, etc. (Trans., 91-2.) This was the effect claimed for it by the bank in the courts below and for it to change front here is unfair both to the courts below and the appellant, as otherwise the court would have been compelled to send the case to the jury.

II.

THE STATUTE OF ARKANSAS EMBRACED IN SECTIONS 530 AND 531 OF KIRBY'S DIGEST, AS APPLIED TO THE INTERSTATE SHIPMENTS INVOLVED IN THIS SUIT, IS VOID, AS A REGULATION OF INTERSTATE COMMERCE.

(1) THE SHIPMENTS OF COTTON INVOLVED IN THIS SUIT WERE INTERSTATE COMMERCE UNTIL ACTUAL DELIVERY TO THE CONSIGNEE.

The latest expression of this court as to the precise time when an interstate shipment loses its character as an article of interstate commerce and becomes subject to the general law of the state is found in *Heyman* v. *Southern R. Co.*, 203 U. S., 271. In that case the court held that intoxicating liquors shipped into the State of South Carolina were not subject to the dispensary law of that state while in the warehouse of the carrier at destination, awaiting delivery to the consignee; this in spite of the fact that the Wilson law provided that intoxicating liquors should be subject to the police regulations of the state upon "arrival" therein. The court said:

> "As the general principle is that goods moving in interstate commerce cease to be such commerce only after delivery and sale in the original package, and as the settled rule is that the Wilson law was not an abdication of the power of Congress to regulate interstate commerce, since that law simply affects an incident of such commerce by allowing the state power to attach after delivery and before sale, we are not concerned with whether, under the law of any particular state, the liability of a railroad company as carrier

ceases and becomes that of a warehouseman on the goods reaching their ultimate destination before notice and before the expiration of a reasonable time for the consignee to receive the goods from the carrier. For, whatever may be the divergent legal rules in the several states concerning the precise time when the liability of a carrier as such in respect to the carriage of goods ends, they cannot affect the general principle as to when an interstate shipment ceases to be under the protection of the commerce clause of the Constitution, and thereby comes under the control of the state authority."

Citation of further authorities in this connection is unnecessary. In *Vance* v. *Vandercook Co.* (No. 1), 170 U. S., 438, this court had under consideration the same dispensary law of South Carolina and took occasion to state certain fundamental propositions:

> "In the inception it is necessary to bear in mind a few elementary propositions, which are so entirely concluded by the previous adjudications of this court, that they need only be briefly recapitulated.
>
> * * * * *
>
> (c) It is also certain that the settled doctrine is that the power to ship merchandise from one state into another carries with it, as an incident, the right in the receiver of the goods to sell them in the original packages, any state regulation to the contrary notwithstanding; that is to say, that the goods received by interstate commerce remain under the shelter of the interstate commerce clause of the Constitution, until by a sale in the original package they have been commingled with the general mass of property in the state."

This is the original package doctrine established as to imports by Chief Justice Marshall in *Brown* v. *Maryland,* 12 Wheat., 419, and followed as to inter-

state shipments in *Leisy* v. *Hardin*, 135 U. S., 100, and never departed from in any case that is brought to our knowledge. See also *Bowman* v. *Chicago & N. W. R. Co.*, 125 U. S., 465.

As the court said in the *Case of the State Freight Tax*, 15 Wallace, 232:

> "Beyond all question the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one state to another was the prominent idea in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce among the several states. A power to prevent embarrassing restrictions by any state was the thing desired. The power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations. It would be absurd to suppose that the transmission of the subjects of trade from the state to the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade either with foreign nations or among the states. * * * Nor does it make any difference whether this interchange of commodities is by land or by water. In either case the bringing of the goods from the seller to the buyer is commerce. Among the states it must have been principally by land when the Constitution was adopted."

It cannot be doubted, therefore, that the State of Arkansas had no power over the shipments of cotton in this suit until those shipments were actually delivered to the consignees.

The state could not tax them until they had been in

the state a sufficient length of time to become part of the general mass of property.

Brown v. *Houston*, 114 U. S., 622.
Coe v. *Errol*, 116 U. S., 517.
Pittsburg, &c., Coal Co. v. *Bates*, 156 U. S., 577.
Kelly v. *Rhoads*, 188 U. S., 1.

Nor could the state adopt any other regulation which would affect the cotton prior to its delivery to consignee. How, then, can the state prescribe the terms of that delivery?

Note, also, that the protection of interstate commerce from state control extends to the contract for interstate transportation. As the court said in *Rhodes* v. *Iowa*, 170 U. S., 412:

> "Whilst it is true that the right to sell free from state interference interstate commerce merchandise was held in *Leisy* v. *Hardin*, to be an essential incident to interstate commerce, it was yet but an incident, as the contract of sale within a state in its nature was usually subject to the control of the legislative authority of the state. On the other hand, *the right to contract for the transportation of merchandise from one state into or across another involved interstate commerce in its fundamental aspect*, and imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several states, since it embraced a contract which must come under the laws of more than one state."

In view of these propositions, which are so well established that they must be considered fundamental, we would deem it unnecessary to go further, were it not for the argument put forth by counsel and adopted by the Supreme Court, that the Arkansas statute, prop-

erly considered, is in that class of legislation pertaining to interstate commerce which a state may enact in the absence of legislation by Congress. To discuss this question we shall recur to the oft repeated division of powers between the state and federal governments with respect to commercial regulations.

(2) THE STATUTE OF ARKANSAS, AS APPLIED TO THE FACTS IN THIS CASE, IS A REGULATION BY THE STATE OF ARKANSAS UPON A SUBJECT-MATTER WHICH IS NATIONAL IN CHARACTER AND REQUIRES UNIFORMITY OF REGULATION.

The statute of Arkansas, of which we complain, contains a clause forbidding the delivery of the goods except upon surrender of the bill of lading, and this clause is applied by the court to the act of a railway company in placing in a warehouse selected by the shipper at destination an unclaimed shipment of interstate freight, in accordance with a stipulation in the bill of lading expressly authorizing it; it is apparent therefore that the statute is something more than a mere negotiable instruments act, and is, in fact, a positive prohibition of the delivery of interstate freight except upon the prescribed terms. As so construed, the statute is an invasion of a field of legislation which has been intrusted exclusively to Congress.

Very early it was decided that the broad field of interstate commerce, the freedom of which it was the purpose of the Constitution to secure, included all of those matters pertaining to interstate commerce which were in their nature national. As Justice Curtis said in *Cooley* v. *Board of Wardens,* 12 Howard, 299:

"Whatever subjects of this power (to regulate

> commerce) are in their nature national and admit of only one system or plan of regulation, may be justly said to be of such a nature as to demand exclusive regulation by Congress."

This court has enumerated only one classification or division of powers between the state and federal governments,—which is the classification stated by Mr. Justice Brown in *Covington, etc., Bridge Co.* v. *Kentucky,* 154 U. S., 204, 209:

> "The power of Congress over commerce between the states and the corresponding power of individual states over such commerce have been the subject of such frequent adjudication in this court, and the relative powers of Congress and the states with respect thereto are so well defined, that each case, as it arises, must be determined upon principles already settled, as falling on one side or the other of the line of demarcation between the powers belonging exclusively to Congress, and those in which the action of the state may be concurrent. The adjudications of this court with respect to the power of the states over the general subject of commerce are divisible into three classes. First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the states cannot interfere at all."

It will be admitted, we suppose, that the Arkansas statute is not included in the first of the above classes. It hardly could be contended that in the face of explicit legislation by Congress the Arkansas statute would prevail.

Nor is it in the second class of cases as defined above.

> "Within the second class of cases—those of what may be termed concurrent jurisdiction—are

embraced laws for the regulation of pilots: *Cooley* v. *Philadelphia Board of Wardens*, 12 How., 299; *Steamship Company* v. *Joliffe*, 2 Wall., 450; *Ex parte McNiel*, 13 Wall., 236; *Wilson* v. *McNamee*, 102 U. S., 572; quarantine and inspection laws and the policing of harbors: *Gibbons* v. *Ogden*, 9 Wheat., 1, 203; *City of New York* v. *Miln*, 11 Pet., 102; *Turner* v. *Maryland*, 107 U. S., 38; *Morgan Steamship Co.* v. *Louisiana*, 118 U. S., 455; the improvement of navigable channels: *County of Mobile* v. *Kimball*, 102 U. S., 691; *Escanaba Co.* v. *Chicago*, 107 U. S., 678; *Huse* v. *Glover*, 119 U. S., 543; the regulation of wharfs, piers, and docks: *Cannon* v. *New Orleans*, 20 Wall., 577; *Packet Company* v. *Keokuk*, 95 U. S., 80; *Packet Company* v. *St. Louis*, 100 U. S., 423; *Packet Company* v. *Catlettsburg*, 105 U. S., 559; *Transportation Company* v. *Parkersburg*, 107 U. S., 691; *Ouachita Packet Co.* v. *Aiken*, 121 U. S., 444; the construction of dams and bridges across the navigable waters of a State: *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet., 245; *Cardwell* v. *American Bridge Co.*, 113 U. S., 205; *Pound* v. *Turck*, 95 U. S., 459; and the establishment of ferries: *Conway* v. *Taylor's Executors*, 1 Black, 603."

Other cases of this class are as follows:

A state statute requiring engineers to take out a license has been upheld, in the absence of Congressional legislation, as being purely a local matter. For this reason, the court refused to apply the doctrine of the silence of Congress.

Smith v. *Alabama*, 124 U. S., 465.

A statute prohibiting the employment on railroad trains of persons who had color blindness or defective vision, has been upheld, for the same reason.

Nashville, C. & St. L. R. Co. v. *Alabama*, 128 U. S., 96.

A statute prohibiting the running of freight trains on Sunday was upheld, in the absence of Congressional action. The court states the ground of its decision thus:

> "The legislative enactments of the states, passed under their admitted police powers, and having a real relation to the domestic peace, order, health and safety of their people, but which, by their necessary operation, affect to some extent, or for a limited time, the conduct of commerce among the states, are yet not invalid by force alone of the grant of power to Congress to regulate such commerce; and, if not obnoxious to some other constitutional provision or destructive of some right secured by the fundamental law, are to be respected in the courts of the Union until they are superseded and displaced by some act of Congress passed in execution of the power granted to it by the Constitution."

Hennington v. *Georgia*, 163 U. S., 299.

A statute prohibiting the heating of passenger cars by stoves carried within the car, has been upheld, as a proper exercise of the police power of the state to secure the comfort and safety of its inhabitants.

New York, N. H. & H. R. Co. v. *New York*, 165 U. S., 628.

The foregoing cases are fairly illustrative of the power which the states possess to adopt regulations of a local nature which may incidentally affect interstate commerce. All of the regulations so sustained are of a local character and all of them are adopted under that power which the states possess, never having surrendered it, to adopt police regulations designed to secure the comfort, health or safety of their inhabitants. All of these regulations affect interstate commerce

only incidentally,—none of them goes so far as to control any feature of the commerce itself.

The delivery of interstate freight, however, and the right to contract with respect to such delivery, are not matters of a local nature, affecting only one state, but are subjects where uniformity of regulation is not only desirable but essential. They involve interstate commerce in its fundamental aspect. It would seem too plain for argument that such matters belong in that class of subjects whose regulation has been confided exclusively to Congress.

Authority is abundant. In *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S., 196, this court held void a state tax upon the capital stock of the ferry company, whose only business in the state consisted in receiving and discharging passengers to and from New Jersey. The following language should be decisive of this case:

> "It matters not that the transportation is made in ferry-boats, which pass between the states every hour of the day. The means of transportation of persons and freight between the states does not change the character of the business as one of commerce, nor does the time within which the distance between the states may be traversed. Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities

by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them, which are local and limited in their nature and sphere of operation, the states may prescribe regulations until Congress intervenes and assumes control of them; yet, when they are national in their character, and require uniformity of regulation affecting alike all the states, the power of Congress is exclusive. Necessarily that power alone can prescribe regulations which are to govern the whole country. And it needs no argument to show that the commerce with foreign nations and between the states, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise, there would be no protection against conflicting regulations of different states, each legislating in favor of its own citizens and products, and against those of other states. It was from apprehension of such conflicting and discriminating state legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the states was vested in Congress."

In *Rhodes* v. *Iowa*, 170 U. S., 412, the court said:

"* * * the right to contract for the transportation of merchandise from one state into or across another involved interstate commerce in its fundamental aspect, and imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several states, * * *"

In *Hall* v. *DeCuir*, 95 U. S., 485, in holding void as

applied to an interstate vessel a Louisiana statute requiring those engaged in the transportation of passengers in the state to give passengers equal rights and privileges in all parts of the vessel, regardless of race or color, the court said:

> "But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the state, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the state must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced."

Again, at page 489, it was said:

> "Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammeled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be."

In *Wabash, etc., R. Co.* v. *Illinois,* 118 U. S., 557, the

courts of Illinois applied the long and short haul statute of that state to two interstate rates. Referring to the case of *Hall* v. *DeCuir* the court said:

> "It is not the railroads themselves that are regulated by this act of the Illinois legislature so much as the charge for transportation, and, in language just cited, if each one of the states through whose territories these goods are transported can fix its own rules for prices, for modes of transit, for times and modes of delivery, and all the other incidents of transportation to which the word 'regulation' can be applied, it is readily seen that the embarrassments upon interstate transportation, as an element of interstate commerce, might be too oppressive to be submitted to. 'It was,' in the language of the court cited above, 'to meet just such a case that the commerce clause of the Constitution was adopted.' "

The Illinois statute, although intended to prevent unjust discrimination and to secure equality in rates, accordingly was held void. Another paragraph from the opinion will be found interesting in this connection:

> "Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the state it may be very just and equitable, and it certainly is the province of the state legislature to determine that question. But when it is attempted to apply to transportation through an entire series of states a principle of this kind, and each one of the states shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the states and upon the transit of goods through those states cannot be overestimated. That this

> species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said. And if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois court concedes it to be, it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution."

In *Central Stock Yards Co.* v. *Louisville & N. R. Co.*, 118 Fed., 113, in holding that the constitution of Kentucky did not require the defendant to deliver live stock at the stockyards of another company the Circuit Court of Appeals used the following language:

> "It is not the means of making a physical connection with other railroads that is aimed at, but it is sought to compel the cars and freight received from one state to be delivered to another at a particular place and in a particular way. If the Kentucky constitution could be given any such construction, it would follow it could regulate interstate commerce. This it cannot do."

These citations are enough to show that the transportation of interstate freight is a matter which the states cannot regulate or control. Delivery being a fundamental part of that transportation as we have shown above, it would seem too plain for argument that the state cannot regulate delivery. The Arkansas statute, however, as construed in this case, not only regulates the delivery of the shipment, but goes so far as to forbid it, except upon prescribed terms. The

right to make a valid contract relating to such delivery, which the company had made, is taken away from it by this statute, and all of its contracts relating to the delivery of interstate freight are subject to the regulations imposed by the State of Arkansas.

To make the case still stronger, suppose that the State of Louisiana had required of the carrier that it should insert in its bills of lading the stipulation contained in these bills; or had required the shipper to designate a warehouse in which the cotton should be stored upon failure of the consignee to remove it within twenty-four hours after arrival (as the shipper here did)—which statute would control? And what would be the attitude of the carrier? If the Arkansas statute creates this confusion when applied to a shipment between two neighboring states, what would be the confusion created by a dozen conflicting state regulations?

The inevitable conclusion is that the statute of Arkansas, as construed by its courts, is void, as being upon a subject exclusively within the jurisdiction of Congress. Forbidding, as it does, a contract such as contained in these bills of lading, and attempting to take out of the carrier's hands control of the delivery of interstate shipments, which is an integral and essential part of their transportation, the statute must be considered an encroachment upon the exclusive power of Congress with respect to all of those features of interstate commerce which are national in character and where uniformity of regulation is desirable.

(3) THE ARKANSAS STATUTE IS NOT OF THAT CLASS OF LEGISLATION WHICH HAS BEEN UPHELD BY THIS COURT AS MERELY EXPRESSIVE OF THE COMMON LAW LIABILITY OF CARRIERS.

Referring to sections 530 and 531 of Kirby's Digest, the state court said:

> "These statutes do not impose any burdens upon interstate commerce, but are in aid of it, to the extent that they provide for the enforcement of duties and protection of rights already existing: * * *" (Printed Trans., 105.)

Again, on page 103, printed transcript, it is said:

> "Appellant does not claim that it has delivered the cotton in question in compliance with these statutes, but contend that the statutes are in conflict with the clause of the Constitution of the United States which vests Congress with power to regulate commerce among the states. But they are not in conflict. It is the duty of the carrier to deliver property specified in a bill of lading to the legal holder thereof. The object of the statutes, and the effect if obeyed, is to enforce this duty and protect the rights of the holder. In the absence of congressional legislation upon the subject, the state can do so."

Pausing only to remark that plaintiff in error contended in the trial court, and in the State Supreme Court, that it had delivered the cotton in accordance with its contract, and that whether or not it had done so was in the first event, and always, a question for a jury to decide, we observe here that the lower court has in mind certain cases which have been designated "aids to commerce" cases, where certain state statutes incidentally and remotely affecting interstate com-

merce, have been upheld as being in aid of that commerce.

This court has never separated the various state statutes brought before it into those which aid interstate commerce and those which interfere with interstate commerce; and has never said that a state may enact legislation in aid of interstate commerce, while forbidden to enact legislation interfering with interstate commerce. The only classification within our knowledge is that made in *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S., 204, which we have quoted above.

Certain statutes, however, have been sustained as merely imposing upon an interstate carrier the duties imposed by the common law, or else as prescribing rules of liability between citizens of the state, which, though, incidentally affecting those engaged in interstate commerce, yet did not affect the carrier in the conduct of its interstate business. We shall consider these cases.

Railroad Company v. Fuller, 17 Wallace, 560:

An Iowa statute required railroads to fix their rates annually, and to post same at stations, and forbade departure from the rates so posted. This was held to be a mere police regulation, and not a regulation of commerce. The court refused to consider the relative jurisdiction of the state and federal government. It is quite plain that the purpose of the statute was to secure publicity in the rates, in order to prevent discrimination and overcharge. It therefore was designed merely to secure from railroad companies the full performance of their common law duties, and the

provision as to fixing and posting the rates was a reasonable means to attain this end. The Arkansas statute, however, is not designed to secure the performance of the common law duties of a railway company bringing freight into the state, but places an added burden upon it greater than that imposed by the common law.

Sherlock v. *Alling*, 93 U. S., 99, was an action against the defendant as owner of a vessel to recover damage for a tort resulting in the death of plaintiff's intestate, under the Indiana statute giving a right of action for death by wrongful act. The statute was held not to be a regulation of interstate commerce, because it did not in any sense relate to or concern interstate commerce; it merely fixed a rule of civil liability, and the fact that it applied to those engaged in interstate commerce, as well as to others, did not make the statute a regulation of such commerce. Note the following:

> "The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the state to which the vessels belong; and it may be said, generally, that the legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, foreign or interstate, or in any pursuit. In our judgment, the statute of Indiana falls under this class."

A statute giving a right of action for death by wrongful act to the administrator of deceased clearly

could not influence the defendant in the conduct of his interstate transportation business.

Western Union Telegraph Co. v. *James*, 162 U. S., 650.

A statute of Georgia provides as follows:

> "Be it enacted by the general assembly of the State of Georgia, and it is hereby enacted by authority of the same, that from and after the passage of this act, every electric telegraph company with a line of wires, wholly or partly in this state, and engaged in telegraphing for the public, shall, during the usual office hours, receive dispatches, whether from other telegraphic lines or from individuals; and, on payment of the usual charges according to the regulations of such company, shall transmit and deliver the same with impartiality and good faith, and with due diligence, under penalty of one hundred dollars, which penalty may be recovered by suit in a justice or other court having jurisdiction thereof, by either the sender of the dispatch, or the person to whom sent or directed, whichever may first sue; Provided, that nothing herein shall be construed as impairing or in any way modifying the right of any person to recover damages for any such breach of contract or duty by any telegraph company, and said penalty and said damage may, if the party so elect, be recovered in the same suit."

It was held that as applied to the delivery within the state of an interstate telegraph message, the statute did not infringe the commerce clause of the Constitution. As this case is relied upon by counsel and by the court below in holding that the Arkansas statute was not a regulation of commerce, we print here a considerable portion of the court's opinion, which makes clear the grounds upon which it was decided:

> "In one sense it affects the transmission of interstate messages, because such transmission is

not completed until the message is delivered to the person to whom it is addressed, or reasonable diligence employed to deliver it. But the statute can be fully carried out and obeyed without in any manner affecting the conduct of the company with regard to the performance of its duties in other states. It would not unfavorably affect or embarrass it in the course of its employment, and hence until Congress speaks upon the subject it would seem that such a statute must be valid. It is the duty of a telegraph company which received a message for transmission, directed to an individual at one of its stations, to deliver that message to the person to whom it is addressed, with reasonable diligence and in good faith. That is a part of its contract, implied by taking the message and receiving payment therefor.

"The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in nowise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the Federal Constitution under discussion? We think not. No tax is laid upon any interstate message, nor is there any regulation of a nature calculated to at all embarrass, obstruct or impede the company in the full and fair performance of its duty as an interstate sender of messages."

The statute was held valid for the very reason, therefore, that it was designed to secure the faithful

and efficient performance of the duties imposed upon the company by the common law, and would not "embarrass, obstruct or impede" the company in the performance of such duties. The Arkansas statute, as we shall show later, cannot "be fully carried out and obeyed without in any manner affecting the conduct of the company with regard to the performance of its duties in other states." A vital distinction between the James case and the case at bar.

Richmond & Allegheny R. Co. v. *R. A. Patterson Tobacco Co.*, 169 U. S., 311.

Here the statute of Virginia in question was as follows:

> "When a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of its own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent; and, although there be such contract in writing, if such thing be lost or injured, such common carrier shall himself be liable therefor, unless, within a reasonable time after demand made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge."

The court held that this statute was not in conflict with the commerce clause, for the reason that it did not add to the common law duties of the carrier, but merely prescribed a rule of evidence ordaining the character of proof necessary to establish a contractual limitation to the carrier's own lines. As construed by the State Supreme Court and upheld by this court, the

statute did not prevent a carrier from limiting its liability to its own line, but only provided that such limitation should be evidenced by the signature of the shipper. Clearly no burden was placed, or attempted to be placed upon the carrier in the conduct of its interstate business. It was conceded by the Supreme Court of Virginia, and by counsel for both parties, and by this court, that if the state had attempted to prevent such a limitation, the statute would have been void. The language of the court makes this plain:

> "It is manifest that the statute of the state of Virginia in question does not attempt to substantially regulate or control contracts as to interstate shipments, but simply establishes a rule of evidence ordaining the character of proof by which a carrier may show that, although it received goods for transportation beyond its own line, nevertheless, by agreement, its liability was limited to its own line. That this is the sole purpose of the statute seems too plain for anything but statement. It leaves the carrier free to make such limitation as to liability on an interstate shipment beyond its own line as it may deem proper, provided only the evidence of the contract is in writing and signed by the shipper. The distinction between a law which forbids a contract to be made and one which simply requires the contract when made to be embodied in a particular form is as obvious as is the difference between the sum of the obligations of a contract and the mere instrument by which their existence may be manifested. The contract is the concrete result of the meeting of the minds of the contracting parties. The evidence thereof is but the instrument by which the fact that the will of the parties did meet is shown."
>
> "It is of course elementary that, where the object of a contract is the transportation of articles of commerce from one state to another, no power is left in the states to burden or forbid it; but this

> does not imply that, because such want of power obtains, there is also no authority on the part of the several states to create rules of evidence governing the form in which such contracts when entered into within their borders may be made, at least, until Congress, by general legislation, has undertaken to govern the subject."

Moreover, it is important to note that the bill of lading upon which suit was brought was issued *in Virginia*, on a shipment from a point in that state to a point in Louisiana: it was not attempted to apply the statute of Virginia to a bill of lading issued upon a shipment originating in another state.

C. M. & St. P. R. Co. v. *Solan*, 169 U. S., 133.

This case was relied on by the court below in its holding that the Arkansas statute was an "aid" to interstate commerce, rather than a burden upon it. The statute involved was the following, being Section 1308 of the Iowa Code of 1873:

> "No contract, receipt, rule or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contact, receipt, rule or regulation been made or entered into."

In an action for personal injuries received within the State of Iowa by a drover accompanying a shipment of stock, the injuries in question resulting from the negligence of the carrier, the court held that the statute as applied to a contract limiting liability for such injuries, was not a regulation of interstate commerce. Clearly this was correct. A similar contract was under consideration by this court in *Railroad Co.* v. *Lockwood*, 17 Wall., 357, and the court held it void

at common law, which ruling represents now the settled law. The Iowa statute, therefore, when properly considered, enacted only that carriers' contracts shall be governed by the common law, and not otherwise. It is to be noted also that this court in its opinion was careful to limit its decision to an injury happening in the State of Iowa. The difference between the statute of Iowa, as thus construed, and the statute of Arkansas, is manifest.

Missouri, K. & T. R. Co. v. *McCann,* 174 U. S., 580.

A statute of Missouri making a carrier receiving property for transportation to a point beyond its line liable for the negligence of its connecting lines, which as interpreted by the Supreme Court of Missouri, did not deprive the carrier of its common law right of limiting its liability to its own line, was held not to be a regulation of interstate commerce, the court following and re-affirming the principles laid down in the *Patterson* case, cited *supra.* Here also it is to be noted that the interstate shipment upon which the action arose, originated *in Missouri,* and the bill of lading was issued in that state. The effect of the statute upon a bill of lading issued in another state was not presented to the court and not considered by it.

Pennsylvania R. Co. v. *Hughes,* 191 U. S., 477.

In this case the railroad company made a contract in New York for the transportation of a horse to a point in Pennsylvania, the contract reciting that in consideration of a reduced freight rate the liability of the company for loss or damage should not exceed $100. The horse was injured in Pennsylvania, through the negligence of the company, and suit was brought

in that state to recover the value of the horse. The courts of Pennsylvania, in accordance with the public policy of that state, refused to recognize the validity of the limited liability clause of the bill of lading, and held the carrier liable for the full value of the horse; and upon appeal to this court it was held that such refusal did not amount to a regulation of interstate commerce. The decision was based upon the ground that in the absence of legislation by Congress the state might require carriers to observe the full measure of their common law liability:

> "The state has a right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, a contract to the contrary notwithstanding. This requirement in the case just cited is held not to be an unlawful attempt to regulate interstate commerce in the absence of Congressional action providing a different measure of liability when contracts, such as the one now before us, are made in relation to interstate carriage."

There is some distinction, however, between the *Hughes* case and the case at bar. Denying the validity of a contract limiting liability for negligence would not in any manner affect the conduct of the interstate transportation business of the carrier, but would rather compel him to greater diligence in that business. He would be in no wise burdened or hindered in respect to such interstate commerce, or the agencies by which he carried it on, but would be left free from all interference in the actual conduct of his business. The Arkansas statute, however, does place a direct and heavy burden upon the interstate transportation, as we shall show later.

We think the true reasoning and distinction of these cases is that recognized by the Supreme Court in its opinion in the *Hughes* case, where it is said (p. 491):

> "But the principle recognized is that *in the absence of Congressional legislation upon the subject,* a state may require a common carrier, although in the execution of a contract for interstate carriage, *to use great care and diligence in the carrying of passengers and transportation of goods,* and to be liable for the whole loss resulting from negligence in the discharge of its duties." (Italics ours.)

Clearly this is a very different matter from requiring a carrier to assume a liability not placed upon it by the common law, not required of it by the safety or the welfare of the people, and burdening it most grievously in the conduct of its business.

All of the foregoing cases may properly be distinguished in the same way. None of the statutes so sustained imposed any burden upon the carrier, or hindered or obstructed it in the conduct of its interstate business; and all of them were designed and intended to secure strict performance by the carrier of the duties imposed by the common law.—to hold the carrier, in other words, to the full measure of its common law liability.

The statute of Arkansas under consideration here is different. It prevents the carrier from making a contract which at common law is sanctioned,—a contract which in no way lessens its full liability as an insurer during the transportation, and which is in itself but an expression that the delivery or storage of the shipment, in the event of a failure to deliver, shall be governed by the rules of the common law. The precise nature of the burden placed upon the carrier we shall discuss in the following section.

(4) THE STATUTE PLACES A DIRECT BURDEN UPON INTERSTATE COMMERCE.

(a) *The effect of the statute is to place an actual burden upon the carrier with respect to every interstate shipment it transports.*

At common law the liability of the carrier as an insurer terminates upon the arrival of the shipment at destination, and the liability of a warehouseman attaches. The precise period when the liability as carrier ceases and that of a warehouseman begins is determined differently in different jurisdictions, but the rule in Arkansas is that the liability as a warehouseman begins only after the allowance to the consignee of a reasonable time after arrival in which to remove the goods.

Missouri Pac. R. Co. v. *Nevill*, 60 Ark., 375, 30 S. W., 425, 28 L. R. A., 80, 46 Am. St. Rep., 208.

Hutchinson, Carriers, 3d Ed., Sec. 704.

At common law, also, when the consignee or owner fails to call for the shipment within a reasonable time after arrival, the carrier may store the same; and in case the carrier has no warehouse facilities of its own, or where the warehouse facilities are inadequate, the carrier may store the shipment in a responsible public warehouse, using reasonable care in the selection of such warehouse. Where, as in this case, the shipper designates the warehouse by marking the bills of lading "Care Compress Company," the carrier is compelled to deliver them at the warehouse of the Compress Company, and having so delivered them its liability as a common carrier terminates.

There are a number of decisions which illustrate these rules of the common law. For instance:

If money is billed to Richard A. Ela, Burlington, Wisconsin, and delivered to H. E. Carpenter, the railroad is liable, but if billed to Richard A. Ela, care H. E. Carpenter, and delivered to Carpenter, the railroad company is not liable, since Carpenter is the agent of the shipper designated by him to receive the shipment.

Ela v. *American Merchants Union Express Co.*, 29 Wis., 611; S. C., 9 Am. Rep., 619.

In *Fitzsimmons* v. *The Southern Express Company*, 2 Am. Rep., 577; 40 Ga., 330, a package was billed to "F, care B." The package was delivered to B, and lost. In a suit against the carrier the court held that the address justified the delivery; that B was made the agent of the owner to receive and hold the package until called for.

In *Marshall* v. *N. Y. C. R. R.*, 45 Barb., 502, 508, goods were consigned to plaintiff at Albany, care Swiftsure Line; it was held that the Swiftsure Line was thereby designated by plaintiff to receive the goods and that a delivery to it was a delivery to plaintiff.

In *First National Bank* v. *Crocker*, 111 Mass., 163, a bill was made "S. O. for Crocker, Smith & Co., Boston," and was held to authorize a delivery to Crocker, Smith & Co., for the benefit of the shipper or his assigns.

Goods were billed "L. W. Bristol, care S. Underhill, Troy," and were delivered to Underhill and converted by him. Held, a valid delivery.

Bristol v. *R. R. Co.*, 9 Barb., 158, 160.

In the Thames, 14 Wall., 98, 105, cotton was billed to shipper's order. On the copy of bill retained by the carrier were these words, "Bennett, Van Pelt & Co.," and the cotton was delivered to them. They failed and the holder of the bill sued the carrier. It seemed to be conceded by the court that if these words were a part of the contract, the delivery was sufficient; but the court held that they were not a part of the contract.

Ordinarily the address of a package to the care of anyone is an authority to the carrier to deliver it to such person.

> *Russell* v. *Livingston*, 16 N. Y., 515, 518.
> *Chicago N. W. Ry. Co.* v. *Allen N. Merrill*, 48 Ill., 425.

These rules of the common law were embodied in the clause of the bill of lading, in which it was stipulated that if the cotton was not removed from the depot at destination within twenty-four hours after arrival, "the cotton may be removed and stored by the company at owner's risk and expense in the warehouse of the company *or one of its selection.*" Printed Trans., 30.) The stipulation, therefore, was valid at common law, and we believe this is conceded.

It is also to be noted that at common law a bill of lading is not "Negotiable," but is assignable—that is, it represents the goods, and a transfer of the bill of lading will under some circumstances pass title to the goods. This transfer, however, must take place *during the transit* of the goods.

> "As a general rule the bill of lading continues to represent the goods *only so long as they are in*

transit. The general principle of the law in dealing with title to personal property, other than that evinced by possession, is that the owner must do all that is within his power to approximate as closely as possible to actual or constructive possession. His title must be evinced by all the *indicia* possible. Upon this ground it has been held that dock warrants and warehouse receipts are not muniments of title of as high and conclusive an order as bills of lading,—the delivery of the former not being equivalent to a delivery of the goods themselves as is generally the case with the latter. The two classes of instruments differ from each other in this respect; that when goods are at sea, the purchaser who takes the bill of lading has done all that is possible in order to take possession of the goods,—there being a physical obstacle to his seeking out the master of the ship and requiring him to attorn to his rights, but when the goods are on land there is no reason why a person who receives a delivery order or dock warrant should not at once lodge it with the bailee and so take actual or constructive possession of the goods. *Ordinarily the bill of lading becomes functus officio as soon as the goods are landed and warehoused in the name of the holder, who thereupon no longer derives his power to control them from his possession of the bill.*" (Porter, Bills of Lading, Sec. 424.) (Italics ours.)

"The assignee gets no greater rights than his assignor."

Hutchinson, Carriers, Sec. 175.

"There is nothing in the possession of the bill which can give to the holder greater or higher rights over the property than were intended in the express or implied contract under which it was transferred."

Porter, Bills of Lading, Sec. 439.

Even a statute similar to the Arkansas statute, mak-

ing bills of lading negotiable instruments, does not put bills of lading upon the same footing in all respects as negotiable paper. This court had under consideration in *Shaw* v. *Railroad Co.*, 101 U. S., 557, similar statutes of Pennsylvania and Missouri, and it was there said:

> "Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable *in the same manner* as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them *in all respects* on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange if not impossible. Such as the liability of indorsers, the duty of demand *ad diem*, notice of non-delivery by the carrier, &c., or the loss of the owner's property by the fraudulent assignment of a thief. If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement. No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express. Especially is so great an innovation as would be placing bills of lading on the same footing in all respects with bills of exchange not to be inferred from words that can be fully satisfied without it. The law has most

> carefully protected the ownership of personal property, other than money, against misappropriation by others than the owner, even when it is out of his possession. This protection would be largely withdrawn if the misappropriation of its symbol or representative could avail to defeat the ownership, even when the person who claims under a misappropriation had reason to believe that the person from whom he took the property had no right to it."

It will be seen, therefore that, leaving out of consideration the Arkansas statute, the railroad company, having delivered the cotton to the Compress Company upon the failure of the consignee to receive it, had done all that the common law required it to do; that the German National Bank, acquiring the bills of lading, as it did, when they were two weeks old, and with knowledge that the cotton was only to be transported thirty miles, must have known also that at that time the cotton was not in the hands of the railway company, but of the Compress Company at Eldorado, the warehouse which the bills of lading showed on their face had been designated by the shipper; and even if the bank had acquired the bills of lading the day after they were issued, its action in holding them for eight or ten weeks before demanding the cotton amounted not only to an assent to the stipulation contained in them, but was tantamount to a direction by it to deliver the cotton to the Compress. See the cases cited *supra:*

> *First Nat. Bank* v. *Crocker*, 111 Mass., 163, and other cases.

But the Supreme Court applied the statute, not to the delivery of the cotton by the Compress Company,

but to the action of the railway company in delivering it to the Compress Company, holding the railway company liable for such delivery, regardless of the purpose for which it was made.

It is apparent, therefore, that the statute as thus construed required the Arkansas Southern Railroad Company to hold all of these shipments of cotton *in its own warehouse*, until the bills of lading were actually presented to it at Eldorado, and demand there made for the cotton. That this requirement was so burdensome and oppressive as to amount to a regulation of commerce, it seems to us there can be no doubt.

The present case furnishes a good illustration. The line of plaintiff in error is only a hundred miles in length, extending into only two states. Presumably it has the facilities for transportation and handling of goods such as would be expected of a small road, running in a sparsely settled country, with termini in towns of fifteen hundred people. At any rate the proof shows that at Eldorado it had no facilities for the storage of cotton.

The Arkansas statute, however, as applied here, requires such a road, with such facilities, to keep in its possession at destination every shipment transported by it, until the holder of the bill of lading at his convenience sees fit to present the bill and demand this shipment. No time limit is set,—the holder may require the company to hold and insure one bale of cotton a week, or, as in this case, nine hundred bales for eight weeks. Not only this, but every shipment, at every station on this small road, may be left in the possession of the carrier while the owner mortgages

or pledges or transfers the bill of lading at his pleasure, knowing that at any time, no matter how remote, he may present it and receive the goods. In other words, the statute requires every interstate carrier doing business in Arkansas to maintain at each of its stations a public warehouse for the convenience of those who wish to trade in bills of lading. The State of Arkansas has absolutely prohibited the delivery of interstate freight except upon the terms prescribed by it. The carrier cannot deliver even at the warehouse designated by the shipper,—cannot, in fact, make any contract respecting such delivery, but is subject to the conditions imposed by the Legislature of Arkansas. An interstate common carrier must subordinate its transportation business to its warehouse business, and devote the greater part of its energy and capital to the conduct of an enterprise which it was not chartered to conduct, and which usually is held *ultra vires.*

A few cases will illustrate the burdensome character of such a regulation. It must be conceded, of course, that the state could not tax, or in any other manner impede the interstate transportation business of the carrier.

Gloucester Ferry Co. v. *Pennsylvania,* 114 U. S., 196.

In *Minnesota* v. *Barber,* 136 U. S., 313, a statute of Minnesota prohibited the sale within the state of all fresh meat except that inspected in manner provided by the act, within twenty-four hours before slaughter. The court held the statute void, as a *regulation of commerce,* although it purported on its face

to be enacted for the protection of the public health, by guaranteeing the sale of none but inspected meats. The effect of the statute, however, was to prohibit the sale within the state of all fresh meat except that which had been inspected in the state before slaughter, thus preventing the inhabitants of other states from sending fresh meat into the state for sale.

> "The enactment of a similar statute by each one of the states composing the Union would result in the destruction of commerce among the several states, so far as such commerce is involved in the transportation from one part of the country to another of animal meats for human food, and entirely free from disease." (p. 321.)

In *Brimmer* v. *Rebman*, 138 U. S., 78, a similar statute of Virginia forbade the sale within the state of fresh beef, veal or mutton which had been slaughtered more than one hundred miles from the place of sale, until it had been inspected as required by the act, the inspection fee being one cent a pound. The court held this statute void upon the same grounds which vitiated the Minnesota statute,—that it in effect closed the markets of the state to the products of other states.

Likewise, in *Voight* v. *Wright*, 141 U. S., 62, a Virginia statute providing for the inspection of flour brought into the state for sale was held void as a regulation of commerce.

If a state may not require fresh meat coming into the state from other states to be inspected before sale, it would seem clear that it cannot require a common carrier bringing shipments of cotton or other merchandise into the state from other states to hold them in its warehouse for an indefinite length of time. If

other states enacted similar laws, and applied them to interstate shipments in the same way, the result would be a total obstruction to the free movement of interstate commmerce, and every interstate common carrier would become a huge warehouseman, whose transportation facilities were entirely subordinate to its imposed duty of caring for all freight entrusted to it until the bills of lading were presented.

McNeill v. *Southern R. Co.*, 202 U. S., 543.

An order of the Railroad Commission of North Carolina, requiring the defendant to deliver four cars containing interstate shipments of coal at a private siding beyond its right of way, was held void as being a burden upon interstate commerce. The court said:

> "Viewing the order which is under consideration in this case as an assertion by the corporation commission of its general power to direct carriers engaged in interstate commerce to deliver all cars containing such commerce beyond their right of way and to a private siding, the order manifestly imposed a burden so direct and so onerous as to leave no room for question that it was a regulation of interstate commerce. On the other hand, treating the order as but the assertion of the power of the corporation commission to so direct in a particular case, in favor of a given person or corporation, the order not only was in its very nature a direct burden and regulation of interstate commerce, but also asserted a power concerning a subject directly covered by the act of Congress to regulate commerce and the amendments to that act, which forbid and provide remedies to prevent unjust discriminations and the subjecting to undue disadvantages by carriers engaged in interstate commerce.
>
> "The direct burden and resulting regulation of interstate commerce operated by an alleged asser-

tion of state authority similar in character to the one here involved was passed upon by the Circuit Court of Appeals for the Sixth District in *Central Stock Yards Co.* v. *Louisville & Nashville R. R. Co.*, 118 Fed. Rep., 113. The court in that case was called upon to determine whether certain laws of Kentucky imposed a direct burden upon interstate commerce and were a regulation of such commerce, upon the assumption that those laws compelled a common carrier engaged in interstate commerce transportation to deliver cars of live stock moving in the channels of interstate commerce at a particular place beyond its own line different from the general place of delivery established by the railway company. In pointing out that if the legislation in question was entitled to the construction claimed for it, it would amount to a state regulation of interstate commerce, it was aptly and tersely said (p. 120):

"'It is thoroughly well settled that a state may not regulate interstate commerce, using the terms in the sense of intercourse and the interchange of traffic between the states. In the case at bar we think the relief sought pertains to the transportation and delivery of interstate freight. It is not the means of making a physical connection with other railroads that is aimed at, but *it is sought to compel the cars and freight received from one state to be delivered to another at a particular place and in a particular way.* If the Kentucky constitution could be given any such construction, it would follow it could regulate interstate commerce. This it cannot do.'" (Italics ours.)

If it is a burden upon interstate commerce to require a carrier to deliver a shipment of coal at a private siding situated on its line, it seems quite as burdensome to require it to hold in its custody, either as carrier or warehouseman, such an amount of cotton as might accumulate until the holders for the time being

of the bills of lading saw fit to present them and demand their shipments. The Arkansas statute is considerably more oppressive in its effect than an occasional order of a railroad commission. The latter can affect only a particular shipment,—this statute affects all shipments.

Houston & Tex. Cent. R. Co. v. *Mayes,* 201 U. S., 321:

A Texas statute requiring a railway company, upon demand of a shipper, to furnish a certain number of cars upon a specified day, to transport merchandise, regardless of other considerations, except strikes and public calamities, held, as applied to furnishing cars for interstate shipments, to be void as a burden upon interstate commerce.

The court fully recognized the power of the state to enact certain regulations which might incidentally affect interstate commerce:

> "That, notwithstanding the exclusive nature of this power, the states may, in the exercise of their police power, make reasonable rules with regard to the methods of carrying on interstate business; the precautions that should be used to avoid danger, the facilities for the comfort of passengers and the safety of freight carrier, and, to a certain extent, the stations at which stoppages shall be made, is settled by repeated decisions of this court. Of course, such rules are inoperative if conflicting with regulations upon the same subject enacted by Congress, and can be supported only when consistent with the general requirement that interstate commerce shall be free and unobstructed, and not amounting to a regulation of such commerce. As the power to build and operate railways, and to acquire land by condemnation, usually rests upon state authorities, the legislatures may annex such conditions as they place

> with regard to *intra*state transportation, and such other rules regarding *inter*state commerce as are not inconsistent with the general right of such commerce to be free and unobstructed."

In this case, therefore, the court has held that the matter of furnishing cars for interstate business is a matter in respect of which interstate commerce should be "free and unobstructed" by burdensome state regulations—in other words, it is a subject national in character, requiring uniformity of regulation. Surely, if the Texas statute was an obstruction to the free and unimpeded flow of interstate commerce, the Arkansas statute is more so. If the matter of furnishing cars for interstate shipments is national in character, requiring uniformity of regulation (and it cannot be doubted that this is so), the matter of *delivering* those same shipments to the consignee at destination is of equally national importance, and requires equal uniformity of regulation. If it is a burden upon a carrier to require it to furnish cars (a requirement which would seem to be conducive of speedy shipments) how much more burdensome is it to require the carrier to hold all shipments indefinitely, forbidding it to deposit them even in a responsible warehouse of the shipper's own selection?

Plainly, therefore, the effect of the statute is to burden the interstate commerce business of the carrier: and as such, it must be void.

(b) *The character of the act as a regulation of interstate commerce is not affected by the provision exempting from its operation bills of lading having the words "not negotiable" stamped on them.*

Section 530 of Kirby's Digest contains the following proviso:

> "Provided that all such receipts and bills of lading which shall have the words 'Not Negotiable' plainly written or stamped on the face thereof, shall be exempt from the provisions of this act."

It was urged in the court below that this provision operated to relieve the statute of its character as a burden upon the carrier, because the latter could at any time exempt its bills of lading from the act by stamping them "Not Negotiable." An excellent statement of this contention is found in the case of *Colgate* v. *Pennsylvania R. Co.*, 102 N. Y., 120, 6 N. E., 114, where the Supreme Court of New York, in discussing a similar provision of the New York statute, said:

> "There is no hardship in the rule. If the carrier does not desire to obey its requirements, he may stamp his bills of lading with the words 'not negotiable.' In that shape they warn the purchaser that the carrier will deliver to the consignee, and not be bound by a transfer of the bills. But if he issues them without that warning, he is bound to know that they may have passed into other hands, and become the property of others than the consignee, and that his duty and his contract is to deliver to him who produces and cancels the evidence of title."

In support of the argument that the statute is thus relieved of its burdensome features are urged the *Patterson* and *McCann* cases, cited *supra*, in which it was

held that statutes of Virginia and Missouri, respectively, providing in effect that contracts limiting a carrier's liability to its own line should be evidenced by the signature of the shipper, were not, *as applied to contracts for interstate transportation made in those states,* regulations of interstate commerce, because, as construed by the courts, the statutes did not deprive the carrier of the right of thus limiting its liability.

Admitting for the sake of argument that the exemption of bills of lading stamped "Not Negotiable" would make the statute valid as to bills of lading issued in the State of Arkansas on shipments between points in that state, and not in conflict with the federal power over commerce in so far as such bills are concerned, yet when applied to a bill of lading issued outside the state, as these bills of lading were, it is apparent the statute must be measured by a different rule. All of the cases referred to as "aids to commerce" cases relate to contracts made or injuries received within the limits of the state whose legislation was being considered; none of them attempts to give to that legislation the extra-territorial effect which the statute would have if applied to shipments of this character.

The fallacy of the argument as applied to the present case may be seen by pursuing it further: If the State of Arkansas can require a carrier issuing a bill of lading in Louisiana upon a shipment originating in the latter state, destined to a point in Arkansas, to stamp its bills of lading "Not Negotiable," in order to avoid the effect of a burdensome and oppressive Arkansas statute, it can compel carriers in every State of the Union, issuing bills of lading upon shipments

destined to points in Arkansas, to stamp thereon the magic device. The small railway in Maine and the large railway in California must instruct their agents at each of their stations to stamp every bill of lading issued on a shipment to Arkansas "Not Negotiable," or with any other stamp, restriction, or limitation that the Arkansas legislature may decide upon. Not only this, but in Mexico and Canada, and foreign countries, wherever a shipment is destined to a point in Arkansas, the carrier who issues the bill of lading must keep a copy of the Arkansas statutes in hand to see what is the latest legend required to be stamped on the bill. If Arkansas can prescribe such a regulation, other states can do so; and the logical consequence of this is that a Chicago or New York merchant who ships goods into many states, or a railway company which accepts shipments for points in more than one state, must keep constantly on hand at every station forms of bills of lading for every state in the United States, and may be required to change them at any time. It is hard to imagine a subject connected with interstate transportation where uniformity of regulation is more essential.

To give the Arkansas statute such an extra-territorial effect, however, would be directly in conflict with the firmly established decisions of this court. The case of *Western Union Tel. Co.* v. *Pendleton,* 122 U. S., 347, is squarely in point. In that case this court held void, as applied to a telegram sent from a point in Indiana to a point in another state, an Indiana statute requiring telegraph companies to deliver messages within one mile of the office of the company at the delivery

point. The Indiana statute was doubtless an "aid to commerce," and the enactment of general statutes of this nature might be a very desirable thing, and greatly assist the senders and receivers of telegrams in securing prompt delivery of them; but for the State of Indiana to attempt to secure the delivery of telegrams in other states was held by this court to be an infringement both upon the rights of those states and the powers of the national government. Likewise, in the present case it might be an "aid to commerce" to have bills of lading issued upon interstate shipments negotiable instruments, and to secure this end by some wise provisions concerning storage of shipments at destination; but for the State of Arkansas to attempt to secure it by this statute is an invasion by that state of the rights of other states and of the federal government.

Another illustrative case is found in *Bowman* v. *Chicago & Northwestern R. Co.*, 125 U. S., 465, where the railway company was sued in Illinois for failure to accept a shipment of liquors tendered it in Illinois for transportation into Iowa, pleading as a defense a statute of Iowa forbidding the importation into that state of intoxicating liquors. In holding the Iowa statute void as applied to the interstate shipment the court said:

> "It might be very convenient and useful in the execution of the policy of prohibition within the state (Iowa) to extend the powers of the state beyond its territorial limits. But such extra-territorial powers cannot be assumed upon such an implication. On the contrary, the nature of the case contradicts their existence. For if they belong to one state, they belong to all, and cannot be exercised severally and independently. The at-

tempt would necessarily produce that conflict and confusion which it was the very purpose of the Constitution by its delegations of national power to prevent."

In *Louisville & Nashville R. Co.* v. *Eubank*, 184 U. S., 27, the court held void as a regulation of interstate commerce the long and short haul clause of the Kentucky Constitution, which the courts of Kentucky had applied to the comparison of a rate within the state to an interstate rate.

> "*But the fact which vitiates the provision,*" said this court, "*is that it compels the carrier to regulate, adjust or fix his interstate rates with some reference at least to his rates within the state, thus enabling the state by constitutional provision or by legislation to directly affect, and in that way to regulate, to some extent the interstate commerce of the carrier, which power of regulation the Constitution of the United States gives to the Federal Congress.*" (Italics ours.)

The foregoing language is applicable to every feature of the situation we have described above.

It was urged in *Central of Georgia R. Co.* v. *Murphey*, 196 U. S., 194, that the statute of Georgia under consideration in that case was not a positive burden on interstate commerce, because it still left the carrier free to limit its liability to its own line. The statute in effect provided that the initial carrier which had so limited its liability should have the duty of tracing lost freight and informing the shipper of the circumstances of its loss before it should be permitted to avail itself of the limitation. It was argued that the statute really was an aid to commerce, within the rule of the *Patterson* and *McCann* cases, and that the carrier might avoid the assumption of liability for loss

upon a connecting line by compliance with its terms. But the court said:

> "But if this statute be valid, this limitation of liability can only be availed of by the railroad company by complying with its provisions. In other words, before it can avail itself of the exemption from liability beyond its own line, provided for by its valid contract, the initial or any connecting carrier must comply with the terms of the statute, and must within thirty days after notification obtain and give to the shipper the information provided for therein. This is certainly a direct burden upon interstate commerce, for it affects most vitally the law in relation to that commerce, and prevents the exemption provided by a legal contract between the parties from taking effect, except upon terms which we hold to be a regulation of interstate commerce."
>
> "The effect of such a statute is direct and immediate upon interstate commerce. It directly affects the liability of the carrier of freight destined to points outside the state, with regard to the transportation of articles of commerce; it prevents a valid contract of exemption from taking effect, except upon a very onerous condition, and it is not of that class of state legislation which has been held to be rather an aid to than a burden upon such commerce. The statute in question prevents the carrier from availing itself of a valid contract, unless such carrier comply with the provisions of the statute by obtaining information which it has no means of compelling another carrier to give, and yet if the information is not obtained the carrier is to be held liable for the negligence of another carrier over whose conduct it has no control. This is not a reasonable regulation in aid of interstate commerce, but a direct and immediate burden upon it."

So in this case, in order to avoid the burdensome effect of the statute, the carrier bringing interstate

shipments into Arkansas is required to stamp bills of lading issued perhaps by another carrier, a thousand miles away, over whose actions it has no control, and cannot even inform itself of the issue of such bills of lading until the freight actually is tendered to it. Suppose that the shipments in this case had been made over a series of connecting railway lines, with the Arkansas Southern as the final or delivering carrier; the latter company could not in any manner avoid the onerous and burdensome duty placed upon it by this statute, because the issue of the bill of lading for such a joint through shipment would be a matter entirely beyond its control. The bill of lading would be issued days and perhaps weeks before the Arkansas Southern Railway Company ever heard of the shipment. The only thing it could do to protect itself would be to refuse to join in through routes or to participate in through rates; and we suppose it will be conceded that a state statute whose effect is to prevent interstate common carriers in other states from entering into through shipping arrangements is opposed to that freedom of interstate commerce which it was the design of the Constitution to protect.

The alternative of stamping the bills of lading "Not Negotiable," therefore, is quite as burdensome as the duty of holding the shipments until the presentation of the bills of lading; and quite as far beyond the power of the State of Arkansas to impose. In whatever aspect the statute is considered, it is burdensome. It requires an interstate carrier bringing interstate shipments of freight into the State of Arkansas, either to

hold them and assume liability therefor for an indefinite length of time, or to cause bills of lading issued in other states to be stamped with the words required by the act; and it deprives such a carrier of the right to make a valid contract such as the one embodied in the stipulation in each of the bills of lading in this case.

(5) THE ARKANSAS STATUTE IS VOID BECAUSE IT CONFLICTS WITH THE WILL OF CONGRESS, AS EXPRESSED IN THE ACT TO REGULATE COMMERCE, APPROVED FEBRUARY 4, 1887.

Conceding, however, for argument's sake, that the court below was correct in holding that the Arkansas statute is merely one of those local regulations incidentally affecting interstate commerce which a state may enact in the absence of legislation by Congress, there still remains the objection that the statute, as it stands, is obnoxious to the will of Congress as expressed in Section 1 of the Act to Regulate Commerce, approved February 4, 1887.

Section one of that Act provides:

> "Section 1. That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment, from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any

other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country. Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one state, and not shipped to or from a foreign country from or to any state or territory as aforesaid.

"The term 'railroad' as used in this act shall include all bridges and ferries used or operated in connection with any railroad and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term 'transportation' shall include all instrumentalities of shipment or carriage.

"All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

Congress has manifested in this section an intention to assume control, under its power to regulate, of every feature of interstate transportation, including the delivery, storage, and handling after the shipment reaches destination. The provisions of the act, it has decreed, "shall not apply * * * to the *receiving, delivering, storage,* or *handling* of property, wholly within one state,"—thus declaring by the plain-

est implication that the act shall apply to the *receiving, delivering, storage* and *handling* of *interstate* shipments. If this were not enough, the third paragraph of the section provides that

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in *connection* therewith, or for the *receiving, delivering. storage.* or *handling* of such property, shall be reasonable and just."

Again, Section 3 of the Act provides:

> "That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

If this language means anything, it means that Congress actually has legislated with respect to the handling and storage at delivery points of interstate freight, including all services rendered in connection therewith and prohibiting discriminations of any kind; and Congress having legislated, it cannot be claimed that the Arkansas statute is valid as being of that class of legislation incidentally affecting interstate commerce which a state may enact in the absence of legislation by Congress.

A brief review of the construction of this section by the Interstate Commerce Commission and by the courts may serve to illustrate the extent to which this

section goes. Almost the first act of the Commission was to ask the carriers for a list of stations at which free cartage was furnished. This was for use in connection with a complaint then pending before the Commission growing out of the practice of the Detroit, Grand Haven and Milwaukee R. Co. to furnish free cartage at Grand Rapids.

1 Int. Com. Rep., p. 671, and Appendix, p. IV.

This controversy subsequently came before this court in the case of *Interstate Commerce Commission* v. *Detroit, G. H. & M. R. Co.*, 167 U. S., 633, where it was held that under the evidence submitted, the defendant railway company's failure to publish the free cartage arrangement in its tariff was not, as applied to the facts in the case, a violation of the act. But this court clearly recognized the power of the Commission over cartage facilities offered by interstate roads. We quote from the opinion of the court (page 646):

> "However, in a matter of this kind, much should be left to the judgment of the Commission, and should it direct, by a general order, that railway companies should thereafter regard cartage when furnished free as one of the terminal charges, and include it as such in their schedules, such an order might be regarded as a reasonable exercise of the Commission's powers."

The Commission, relying largely upon this expression, has uniformly interpreted the first section of the Act as giving it power over all the incidental features relating to the delivery of interstate traffic. In *American Warehousemen's Association* v. *Ill. Cent. R. Co.*, VII I. C. Rep., 556, it made an extensive investigation into the rates charged for storage by common carriers

at the chief cities of the country, and held that it was within the power of the Commission to require carriers, by general order, to state what free storage is granted, and the terms and conditions under which it will be granted. The Commission expressed its views in this manner:

> "The charges made for such services, and all rules and regulations which in any wise change, affect or determine such aggregate compensation, are plainly required by the statute to be shown by the carriers upon their published rate schedules. The privileges in question do change, affect or determine the aggregate charge for the shipper and, to the extent of cost, for the carrier as well. They are also terminal facilities which are covered by the regular transportation charge or for which a special charge is imposed.
>
> "The function of the carrier is to receive, transport and deliver. As a rule, it can only be forced into the position of warehouseman through lack of diligence on the part of the consignee in the removal of his property. With no general duty to act as warehouseman for indefinite periods in connection with its primary obligations as a common carrier, it cannot assume to provide shippers with valuable warehouse facilities which are not essential to its business as a carrier, without furnishing them for all shippers at all times and upon the same terms and notifying the public thereof in the manner provided by law. Distributing consignments in part-lots to different subsequently designated persons, reshipping upon shipper's order parts of consignments held in store, suspending collecting of charges for use of cars beyond specified reasonable periods of time after such cars have been placed for loading or unloading by shippers or consignees, *and all kindred concessions,* come within the same requirements of *impartiality and publication.*"

Section 23 of the Interstate Commerce Act provides:

> "That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic, under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ."

If it be true, as the Commission held in the case just cited, that a carrier cannot assume to provide shippers with valuable warehouse facilities, which are not essential to its business as a carrier, without furnishing them for all shippers, at all times, and upon the same terms, and notifying the public thereof in the manner provided by law, and if it be true that the statute of Arkansas is to have the effect given to it by the Supreme Court of that state, then it necessarily follows that the railroad company, in giving these extensive warehouse privileges, and remaining liable under the provisions of that statute, would be required to extend to shippers at different points, and in other states, the same facilities, and the Arkansas statute, therefore, in requiring the carrier to conduct its business in other states with reference to the conduct of its business in Arkansas, would be squarely within the condemnation of this court in the case of *Eubank*.

Again, in *Pennsylvania Millers' State Association* v. *Philadelphia & Reading R. Co.*, 8 I. C. Rep., 531, the Commission had under consideration the rules and regulations of the defendant carriers concerning "free time" allowed on the storage of interstate shipments at destination before the accrual of demurrage charges. They decided under the evidence that 48 hours was an unreasonably small time allowance and made an order accordingly.

To show the views of the Commission as to its powers we quote from the opinion:

> "By section 1 of the law, storage is named as a 'service in connection' with transportation, and the charges therefor are required to be 'reasonable and just.' In *American Warehousemen's Asso.* v. *Illinois C. R. Co.*, 7 I. C. C. Rep., 591, we held that the schedules of rates required by section 6 of the law to be printed, posted, and filed with the Commission, should state among other terminal charges the rules and regulations, if any, of the carrier in relation to storage; and the Commission, February 8, 1898, issued a general order directing 'that all carriers subject to the Act shall plainly indicate upon the schedules published and filed with the Commission under the provisions of the sixth section * * * what storage in stations, warehouses or cars will be permitted, stating the length of time, the character of the storage, the service rendered in connection therewith, and all the terms and conditions upon which the same will be granted.' This order became effective April 1, 1898, and at that date the carriers issued a general circular providing that 'property unloaded in the railroad stations or warehouses must be removed within 24 hours after arrival and if not so removed will, at the option of the carrier, either be removed and stored at a public warehouse at owner's cost and risk, and there held sub-

ject to lien for freight and charges, or will be retained in carrier's station or warehouse under the same conditions and subject to like charges for storage as prevail at public warehouses, except *as may be provided by local regulations at destination* as made by public warehouses or delivering carrier."

In *Palmer's Dock Hay & Produce Board of Trade* v. *Pennsylvania R. Co.*, 9 I. C. Rep., 61, complaint was made of unreasonable discrimination in the *delivery* of interstate traffic caused by the refusal of the railroad company to continue a practice of delivering interstate carload shipments of hay at a certain track in the City of Brooklyn; and after hearing the evidence and going fully into the matter, the Commission decided that the company was justified under the circumstances in refusing to make delivery at such track.

In *Blackman* v. *Southern R. Co.*, 10 I. C. Rep., 352, the Commission found that the schedule of *storage charges* published in its tariff by the Southern Railway Company for storage in its depot at Macon, Georgia, was not unreasonable, and held also that the *storage rates* and *regulations* charged by carriers subject to the Act must be *filed and published* in their tariffs.

In *Miner* v. *N. Y., N. H. & H. R. Co.*, 10 I. C. Rep., 422, the Commission, after hearing, ordered the defendant railroad company to deliver cars of fresh meat consigned to complainant at a team track opposite his place of business.

In *Cattle Raisers' Association* v. *Chicago, B. & Q. R. Co.*, 11 I. C. Rep., 277, the Commission held that the two dollars per car terminal charge made by defendants for the delivery of interstate shipments of live

stock at the Union Stock Yards in Chicago was unjust and unreasonable, and that one dollar would be a reasonable charge.

The Court of Civil Appeals of Texas has expressly ruled that the act to regulate commerce includes the delivery of freight. In *Fielder* v. *M. K. & T. R. Co.* (1897), 42 S. W., 362, which was a suit brought to recover penalties prescribed by a Texas statute for alleged discrimination in failure to deliver interstate shipments of coal at a private siding, it was held that the Texas statute had no application, because Congress had *legislated with respect to the delivery of interstate shipments.* As the case is directly in point we quote at length:

> "We do not understand from the manner in which the plaintiff has presented questions to this court for revision that he complains of the judgment in his favor for actual damages; but his grounds of complaint are based upon the action of the court in refusing to entertain and hear and submit to the jury that branch of the case which sought to recover penalties for the alleged discrimination. The court, after hearing the evidence as to the character of the shipments in question, came to the conclusion that the shipments were interstate, and that the state statute relating to the recovery of penalties, upon which plaintiff based his cause of action on this branch of the case, did not apply, and in effect ruled that, as the shipments were concerning matters of interstate commerce, no issue as to that branch of the case would be submitted. In our opinion, as stated in our conclusions of fact, the shipments in question related to interstate commerce. The fact that the shipments had reached the place of destination would not necessarily destroy the interstate character of the shipments. *The right of Congress to*

control interstate commerce is not solely limited while the commerce is in actual transportation, but extends to and includes the necessary handling and delivery of that commerce at terminal points. It is as much necessary to the interest of interstate commerce and the uniformity of rule that should apply to transportation of that character of commerce, which is one of the objects intended to be accomplished by reserving this power solely to Congress, that it should retain control and dominion over the shipments at the beginning and terminal points, as well as during the actual transportation of the commerce. The plaintiff's cause, on that branch of it which seeks to recover penalties, is upon the theory that the duty of the carrier had not ceased when the coal actually arrived at Sherman, but that the carrier still, as a part of its duty connected with the delivery of the articles shipped, should do something more with the shipment; that is, place it in the actual possession of the plaintiff on his spur tracks leading to his coal bins. The fact that the assertion is made that there was a failure of duty in this respect confessedly admits that the dominion and control of the carrier over the shipment had not ceased, and that, by reason of its duty as a carrier, there was incumbent upon it something further to be done in order to make the delivery perfect, and to finally end and terminate the shipment. In effect, the position assumed by plaintiff upon this branch of the case as the basis for his cause of action in the recovery of penalties confessedly admits that the transportation had not in law ceased. Therefore, in our view of this question, these shipments being matters of interstate commerce, there was no error in the court in eliminating this branch of the case from consideration, and in refusing to apply the state statute to these shipments. There are cases which, in effect, hold that state regulations with reference to some matters of interstate commerce may be en-

> forced where congress has not acted in that particular upon such shipments; but that rule cannot be invoked in this case, for there was in existence, at the time that the state statute was passed under which plaintiff seeks to recover the penalties, *an almost identical and similar statute of Congress*, relating to the same subject, and prescribing penalties for failure to observe the requirements of the statute." (Italics ours.)

In *Gulf, C. & S. F. R. Co.* v. *Hefley*, 158 U. S., 98, this court held that a statute of Texas imposing a penalty for failure to deliver goods upon tender of the rate named in the bill of lading, was not applicable to an interstate shipment, the latter being governed by the act to regulate commerce.

From these citations it appears that the *delivery* of interstate freight is a matter so closely related to the transportation of such freight that Congress has seen fit to regulate it under the commerce clause, by giving the Commission power over all incidental services connected therewith. Such legislation is, of course, exclusive. If the Act to Regulate Commerce is silent as to any feature of such delivery, it is an expression of the will of Congress that such features shall be left free from regulation.

> *Bowman* v. *Chicago & N. W. R. Co.*, 125 U. S., 465.

Even a statute "in aid of commerce" is void when once Congress has spoken. Such a harmless statute as that considered in *Western Union Tel. Co.* v. *James*, 162 U. S., 650, which merely enacted the common law, is void when Congress has acted. This court said in speaking of that statute:

> "It would not unfavorably affect or embarrass

> it (the carrier) in the course of its employment, and hence *until Congress speaks* upon the subject it would seem that such a statute must be valid."

We cannot agree, therefore, with the Supreme Court of Arkansas when it declares that a search of the federal statutes fails to reveal any statute upon the subject covered by sections 530 and 531 of Kirby's Digest. The Act to Regulate Commerce covers *the delivery*, as well as the transportation of interstate freight; and the statute of Arkansas, forbidding, in effect, any delivery whatever, except upon prescribed terms, is quite as obnoxious to that act as if it required delivery in a manner contrary to the act, as in the two Texas statutes referred to in the foregoing sections.

Whatever else may be said for it, therefore, we maintain that the Arkansas statute is void, because Congress has in fact passed a statute regulating the delivery of interstate freight, and this federal statute, therefore, excludes all state regulation whatever.

In conclusion, we think the correct interpretation of the statute is that it is not applicable to the case at bar. The railway company having complied with its contract of transportation, and placed the cotton in storage with a responsible warehouseman selected by the shipper, at the expiration of the reasonable time designated in its bills of lading, is of course not liable to a transferee of the bill who failed to present the bill of lading and demand the cotton within such reasonable time.

The compress company, having delivered the cotton, in the face of the statute, without requiring the production or surrender of the bills, is of course liable

to the holder thereof. As the Supreme Court of the state has decided, however, that the Arkansas statute controls not only the misdelivery by the compress company, but also the action of the railway company in placing the cotton in the warehouse designated by the shipper, as it was directed by the bills of lading sued upon to do, and as its contract provided that it might do, such an interpretation can have but one result,—the repugnancy of the statute to the commerce clause of the Constitution of the United States.

The judgment in this case is on this record unjust and unconscionable and but for the rigid application of the Arkansas statutes would never have been rendered; and we respectfully submit that the judgment of the Supreme Court of Arkansas should be reversed.

EDWARD B. PEIRCE,
For Plaintiffs in Error.

Office Supreme Court, U. S.
FILED
FEB 21 1907
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. [redacted] 56

THE ARKANSAS SOUTHERN RAILROAD COMPANY AND GEORGE P. GRIFFITH,
Plaintiffs in Error,

vs.

THE GERMAN NATIONAL BANK,
Defendant in Error.

Error to the Supreme Court of Arkansas.

BRIEF FOR THE ARKANSAS SOUTHERN RAILROAD COMPANY ON MOTION OF DEFENDANT IN ERROR TO DISMISS.

EDWARD B. PRINCE,
For Plaintiffs in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 326

THE ARKANSAS SOUTHERN RAILROAD COMPANY and GEORGE C. GRIFFITH,
Plaintiffs in Error,

vs.

THE GERMAN NATIONAL BANK,
Defendant in Error.

Error to the Supreme Court of Arkansas.

BRIEF FOR THE ARKANSAS SOUTHERN RAILROAD COMPANY ON MOTION OF DEFENDANT IN ERROR TO DISMISS.

STATEMENT.

This suit was brought by the German National Bank, of Little Rock, Arkansas, against the Arkansas Southern Railway Company, a common carrier, to recover the value of about 950 bales of cotton, on bills of lading issued by the defendant and held by the bank as assignee.

The bills of lading were made out by the shipper and tendered to the agent of the Railway Company to be signed. Each shipment was consigned as follows (Transcript, page 31):

"Consigned to S/O
C/o Compress
ElDorado, Ark.
Ntf'y Alphin & Lake Cotton Co."

The shipments were as follows:

Nov. 22, 1902,	Bernice, La.,	to Eldorado, Ark.	25	Bales.
Nov. 24, 1902,	"	"	72	"
Nov. 25, 1902,	"	"	49	"
Nov. 26, 1902,	"	"	74	"
Nov. 28, 1902,	"	"	48	"
Nov. 29, 1902,	"	"	72	"
Dec. 2, 1902,	"	"	96	"
Dec. 3, 1902,	"	"	122	"
Dec. 3, 1902,	"	"	49	"
Dec. 8, 1902,	"	"	26	"
Dec. 9, 1902,	"	"	75	"
Dec. 9, 1902,	"	"	74	"
Dec. 10, 1902,	"	"	120	"
Dec. 22, 1902,	"	"	48	"

Each of the bills of lading contained the following clause (Transcript, page 30):

> "Notice.—This contract is accomplished, and the liability of the companies as common carriers thereunder terminates on the arrival of the cotton at the station or depot of delivery, and it is understood and agreed that the companies will be liable as warehousemen only thereafter; and, unless removed by the consignee from the station or depot of delivery within twenty-four hours after its said arrival, the cotton may be removed and stored by the company at owner's risk and expense in the warehouse of the company or one of its selection; and after remaining in such warehouse sixty days, the carrier at point of destination may, at its election, advertise in one or more newspapers published in that county for not less than ten days, and sell the cotton either at that point or at such point on its line as it may select, and out of proceeds of such sale pay all charges."

At the time these shipments were made, the following statute was in force in Arkansas (Kirby's Dig., 530):

> "Warehouse receipts given by any warehouse-

man, wharfinger or other person or firm for any goods, wares, merchandise, cotton, grain, flour or other produce or commodity, stored or deposited, and all bills of lading and transportation receipts of every kind given by any carrier, boat, vessel, railroad, transportation or transfer company, may be transferred by indorsement in writing thereon, and the delivery thereof so indorsed, and any and all persons to whom the same may be transferred shall be deemed and held to be the owner of such goods, wares, merchandise, cotton, grain, flour or other produce or commodity, as far as to give validity to any pledge, lien or transfer given, made or created thereby, as on the faith thereof, and no property so stored or deposited, as specified in such bills of lading or receipts, shall be delivered except on surrender and cancellation of such receipts and bills of lading; provided, that all such receipts and bills of lading which shall have the words 'Not negotiable' plainly written or stamped on the face thereof shall be exempt from the provisions of this act."

Upon the arrival of the cotton at Eldorado, the shipper or holder of the bill of lading failed to remove the same, and it was delivered by the Railway Company to the Compress Company. The bank never received the cotton.

The trial court directed a verdict for the plaintiff upon each of the bills of lading, and the Supreme Court of the state affirmed the judgment, on the ground that delivery had not been made by the Railway Company as required by the above statute; and to reverse that judgment this writ of error is sued out.

It is the contention of the plaintiff in error that the statute of Arkansas quoted above was, as applied to this interstate shipment, void as a regulation of interstate commerce.

Argument on Motion to Dismiss.

THIS COURT HAS JURISDICTION.

1. It clearly appears from the record that a federal question was presented in the court below and was decided adversely to plaintiff in error.

2. No other question not federal was decided by the court below which would sustain the judgment.

As to the first of these propositions, no argument is necessary. The plaintiff in error set up in the state court that the state statute was repugnant to the commerce clause of the Constitution of the United States and also to the Act to Regulate Commerce, and contended that said statute was void as a regulation of interstate commerce. This contention was denied by the Supreme Court of the state, which expressly sustained the validity of the state statute. (Printed transcript, pp. 103-6.)

The motion itself assigns as ground for dismissing the writ the fact that eight of the twelve assignments of error do not contain a federal question; ignoring altogether the first four assignments, which are directed to the erroneous decision of the state court upon the federal question.

In determining whether a federal question was decided adversely to the plaintiff in error, this court will look only to the record itself; nothing out of the record certified to this court can be taken into consideration. This must be shown; first, either by express aver-

ment or by necessary intendment in the pleadings of the case. Or, secondly, by direction given by the court and stated in the exception. Or, thirdly, it must be entered on the record of the proceeding in the Appellate Court in cases where the record shows that such a point may have arisen and been decided, that it was in fact raised and decided; and this entry must appear to have been made by the order of the court and certified by the clerk as a part of the record in the state court.

Armstrong v. *Treasurer of Athens County,* 16 Peters, 285.

In determining whether a federal question was decided adversely to plaintiff in error, this court will act only upon the record of the court below; and of that record the petition for writ of error or the assignment of errors made in the state court forms no part.

Clark v. *Pennsylvania* (1888), 128 U. S., 397; 9 Sup. Ct. R., 113.

California Powder Works v. *Davis* (1893), 151 U. S., 389; 14 Sup. Ct. R., 350.

Sayward v. *Denny* (1894), 158 U. S., 183; 15 Sup. Ct. R., 777.

Butler v. *Gage* (1890), 138 U. S., 52; 11 Sup. Ct. R., 235.

Manning v. *French* (1889), 133 U. S., 186; 10 Sup. Ct. Rep., 258.

The assignment of errors made in the state court cannot be looked to to determine whether a federal question was decided.

Fowler v. *Lamson* (1896), 164 U. S., 262; 17 Sup. Ct. R., 112.

"An assignment of errors cannot be availed of to import error into a cause, which the record does not show were raised and passed on in the court below, but we may refer to such assignment by way of convenience to ascertain the contention of plaintiffs in error."

Mo. P. Ry. Co. v. *Fitzgerald* (1895), 160 U. S., 556; 16 Sup. Ct. R., 389.

The only ground of dismissal urged in the motion is, as we have said, that eight of the twelve assignments of error contain non-federal questions Also on page 10 of his argument, defendant in error quotes from our petition for rehearing in the state court, in order to show that the judgment of that court is based upon a non-federal question. As shown above, whether a federal question was decided is not to be determined from our assignments of error, and for the same reason it would seem that a petition for rehearing in the state court is not a criterion by which to determine it.

The motion to dismiss the writ of error appears, however, to be based on the ground that non-federal questions were decided by the state court sufficient to sustain the judgment.

While this court will not examine the evidence, yet for the purpose, not of deciding the facts, but of throwing light on the findings, it will examine the entire record, including the opinion of the court below.

Egan v. *Hart* (1896), 165 U. S., 188; Sup. Ct. R., 300.

Eustis v. *Bolles* (1893), 150 U. S., 361; 14 Sup. Ct. R., 131.

A careful examination of the record in the case at bar will show conclusively that the decision of the state court was based upon the federal question and that no other question was decided.

If it sufficiently appears from the record itself that the repugnancy of a statute of a state to the Constitution of the United States was drawn in question, or that the question was applicable to the case, this court has jurisdiction of the cause, although the record should not in terms state that the repugnancy of the statute of the state to any part of the Constitution was drawn in question.

Satterlee v. *Matthewson*, 2 Pet., 380, 410.
McCullough v. *Virginia* (1898), 172 U. S., 119; 19 Sup. Ct. R., 134.
Bridge Proprietors v. *Hoboken* Co., 1 Wall., 116, 143.

Each of the counts in the complaint names the Bank of Bernice as consignor and alleges the issue of the bill of lading, and that the defendant agreed to deliver said cotton to the order of the Bank of Bernice. The 19th count alleges the refusal of the defendant to deliver the cotton. (Printed transcript, pp. 10-12.)

Each paragraph of the answer admits the execution of the bill of lading set forth in the corresponding count of the complaint, but denies that the defendant agreed to deliver the cotton to the order of the Bank of Bernice, and alleges that the defendant agreed to deliver the cotton to the Compress Company as agent for the holder of the bill of lading in case the holder of the bill of lading did not present the same and demand the

cotton on its arrival at Eldorado. (Printed transcript, pp. 13-17.) The nineteenth paragraph of the answer, as amended, averred the foregoing stipulation of the bill of lading, and performance in accordance therewith. (Printed transcript, p. 18.) The second amendment to the answer contains the same allegations, and further alleges a custom at Eldorado to deliver cotton in such manner, and that the Compress Company was a responsible public warehouse. (Printed transcript, p. 20.)

It thus appears that the question of the validity of the stipulation in the bill of lading was squarely raised on the pleadings.

Each of the allegations in each paragraph of the answer, that the defendant undertook to deliver the cotton to the Compress Company as the agent for the holder of the bill of lading, involved the validity of this stipulation, because the shipper of the cotton, in making a contract containing this stipulation, bound himself and every subsequent holder of the bill of lading, by the provision that if the bill of lading was not presented within twenty-four hours after arrival of the cotton, the Railway Company might store the shipment in its warehouse, or one of its selection, and the necessary effect of such a contract was to make the warehouse, when selected, the agent of the shipper, and therefore of every subsequent holder of the bill of lading.

The law is well settled that where the shipper of goods consigns them to himself at destination, "care of A," he thereby makes A his agent for the receipt of

the goods, and delivery to A will discharge the carrier.

Ela v. *Am. Merchants Un. Exp. Co.* (1872), 29 Wis., 611; 9 Am. Rep., 619.

Fitzsimmons v. *So. Exp. Co.* (1869), 40 Ga., 330; 2 Am. Rep., 577.

The Thames, 14 Wall., 98.

C. & N. W. Ry. Co. v. *Merrill* (1868), 48 Ill., 425.

From the above, it will appear that there was *no issue in the case* that did not involve the validity of the stipulation.

At the conclusion of the evidence the trial court directed a verdict *for the plaintiff*, in words as follows:

> "The court instructs the jury that the plaintiff is entitled to a verdict upon each bill of lading sued upon."

The Supreme Court affirmed the judgment.

The evidence showed that Eldorado was only a short distance from Bernice; that the cotton was loaded on the cars at Bernice and bill of lading was issued after it was loaded; that the cotton went forward the same day it was loaded, or the day after, and arrived at Eldorado on the next day; that neither the shipper nor the holder of the bill of lading was present to receive the cotton on its arrival, and that it was delivered to the Compress Company. Evidence was conflicting as to the exact manner of the delivery to the Compress Company. The Railway Company had no facilities at Eldorado for handling and storing cotton. The German National Bank, holder of the bills of lading, did not present them and demand the cotton of the Rail-

way Company until January 19, 1904, from six to eight weeks after the shipment.

Bearing the evidence in mind, and reading carefully the opinion of the Supreme Court of the state, it seems clear that the court based its judgment on the ground that the stipulation in the bills of lading was not a valid one, because contrary to the statute of Arkansas, which statute was not a regulation of interstate commerce; and that the judgment can be sustained on no other ground.

As shown above, every issue presented on the pleadings involved the validity of this stipulation; and the trial court directed a verdict for the plaintiff, thus holding, as a matter of law, that the stipulation was invalid. The Supreme Court affirmed the judgment, thus holding, as a matter of law, that the defense of the stipulation could not prevail, because contrary to the statute of the state, which statute it was expressly declared was not a regulation of interstate commerce. The record discloses no other question upon which the judgment of the court can rest.

It will be sufficient, for this court to maintain jurisdiction, if the record shows that the constitutionality of a state law must have been questioned, and the decision has been in favor of the party claiming under such law.

Craig v. *State,* 4 Peters Rep., 410.

If the necessary effect of the judgment is to determine adversely to the plaintiff in error rights and immunities claimed by him, involving a federal question, the jurisdiction of this court may be invoked, on the

ground that a right or immunity claimed by him under the Constitution of the United States has been denied by the judgment sought to be reviewed.

Roby v. *Colehour* (1892), 146 U. S., 153; 13 Sup. Ct. R., 47.

It is to be noted here that no finding of facts was made by the state court. The opinion recites some of the evidence, preliminary to a discussion of the issues involved (Record, p. 160, Printed transcript, p. 100), but the decision of the court, beginning at page 163 of the record, middle of page 102, printed transcript, is in nowise based upon its recital of facts, but is directed entirely toward the contention of this plaintiff in error, appellant there, that the statute, by virtue of which its contract was invalid, was void as a regulation of interstate commerce.

Were it not for the fact that a verdict was directed by the trial court for the plaintiff, and judgment entered thereon which was affirmed by the Supreme Court, the argument that, irrespective of any Federal question, the judgment of the court must be sustained on the theory that the Railway Company failed to transmit proper instructions to the Compress Company to hold for account of the holders of the bills of lading, might possibly arise on this record. (See brief for defendant in error, page 9.) But from a mere reading of the testimony adduced at the trial, as Justice McCulloch clearly shows in his dissenting opinion, (Transcript, pages 107, 8, 9) it will be apparent that the evidence on this point was conflicting, and, under any circumstances, would have been submitted

to the jury had the court deemed it essential in deciding the issues. The court, on the other hand, directed a verdict for the plaintiff, thus recognizing that the question was not an issue in the case. If it be recognized by this court that it was, then the issue was clearly decided on evidence that was in conflict, and the plaintiff in error is thereby deprived of its constitutional right of a trial by jury. Moreover, the negligence of the Railway Company in this regard was never put in issue by the pleadings.

Viewed in the light of the foregoing, each of the assignments of error complained of involves this same federal question. If its contract was a valid one, the Railway Company has done all that it was required to do; and the German National Bank, as assignee of its bills of lading, has no cause of action against it; and though twelve assignments of error were made, each of them involves the same question, although, perhaps, in different form.

The motion should be denied.

Respectfully submitted,

EDWARD B. PEIRCE,
For Plaintiff in Error.

IN THE

Supreme Court of the United States

THE ARKANSAS SOUTHERN RAILROAD COMPANY AND GEORGE C. GRIFFITH

.....*Plaintiffs in Error,*

vs. No. 326.

THE GERMAN NATIONAL BANK,

.....*Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

I.

The action was commenced in the State Court by the Bank against the railroad company upon various bills of lading for the shipment of cotton, all but two of which originated on the line of the railroad company in Louisiana and ended at El Dorado in the State of Arkansas.

These bills were all in the usual form, were issued to "Shippers Order," and each bill contained the following:

"Consigned to S. O.,

care Compress,

El Dorado, Ark.

Notify, Alphin & Lake Cotton Co." (Printed Record, 30, 31.)

The complaint sets forth the bills of lading, their issue, etc., by the railroad company, their transfer to the Bank for value, demand on the railroad company for the cotton, its failure to deliver and damages. (Record, 10.)

The answer admitted the execution of the bills of lading, but alleged, "that in and by the terms of said bill of lading the cotton was consigned to the care of the compress company at El Dorado, whereby the defendant undertook to deliver the said cotton to the said compress company as agent for the holder of the bill of lading in case such holder did not present the said bill and demand the delivery of the cotton from defendant at the time of its arrival at El Dorado." (Record, 13.)

That defendant in "compliance with its undertakings as set out in said bills of lading delivered the said several lots of cotton to the compress company, as agent for said several holders of the bills of lading." (Record, 17.)

II.

Learned counsel for the railroad company labors to show that upon the testimony, the case should have been

permitted to go to the jury, and that because the court directed a verdict for the Bank, it must have based its decision upon the statute alone and not upon the conclusiveness of the evidence.

It will be noted that the railroad company by its pleadings bases its defense chiefly upon the allegation that by the terms of the bills of lading it undertook to deliver the cotton to the compress company *as the agent for the holder of the bills of lading*, and that it did so deliver the cotton. At the trial this was the main issue upon the evidence.

We submit that the evidence conclusively shows:

1. That when the cotton reached El Dorado it was at once delivered to the compress company without waiting for twenty-four hours for the holder of the bills of lading to call for it as provided in that clause of the bills of lading relied upon by counsel. This is shown by the testimony of Hutchingson the agent of the railroad company at El Dorado, and a witness for the company who says: (Tr. p. 60.)

Q. "Just state to the jury in your own way how the cotton in controversy in this suit, what was done with it when it got here?"

A. *"It was delivered to the compress as soon as it was received."*

Wright, the manager of the compress company, and a witness for the bank said: (Tr. p. 80.)

Q. "What instructions if any did you receive from the Arkansas Southern Railroad Company or its agents in reference to the person for whose account the cotton delivered to the compress by the Arkansas Southern Railroad Co. was to be held?"

A. "I received no instructions regarding the cotton that was put in the side track. It was all supposed to belong to the Alphin & Lake Cotton Co., *and was to be unloaded at once.*"

2. The cotton was delivered to the compress company as the *property of Alphin & Lake Cotton Co.* and for *account of Alphin & Lake Cotton Co.* This is clearly shown by the testimony of Hutchinson. He testifies that when the cotton arrived he entered a memorandum of it in a little book by which Wright the manager of the compress company checked up the cotton and if found correct, was O. K. 'd by him; that he delivered the cotton to the compress company because it was billed that way. (Printed Trans. 63.) *It was delivered as billed.* (Printed Trans. 65.) All the cotton which came in over the railroad went into the compress and *it was all billed to Alphin & Lake Cotton Company.* The freight bills were all presented to and paid by Alphin & Lake Cotton Co. This was done once a week. In making delivery to the compress company no other directions were given than that contained in the little book. Nothing was ever said about it in any other way. He asked the compress company several times if they had any bills of lading, and several times they turned over bills

of lading. Lake as a rule turned over the bills of lading. He looked to Lake for that and expected Lake to produce them. Never required the compress company to produce bills of lading at the time of delivery. He says the compress company knew that the cotton was not to go out until the bills of lading were turned in, because Lake was president of the company and Wright had been getting bills of lading and giving them to him—this is a mere conclusion or surmise by him. Lake was at Little Rock and Wright was manager at El Dorado. He was looking to Lake for that. He gave no instructions not to let the cotton go out without bills of lading. Never demanded the bills of lading of the compress company when the cotton went in. Wright brought some bills of lading afterwards, that is why he said the company knew that it was going out without bills of lading being produced. But he was looking to Lake all the time for that (Printed Trans. 66, 67.)

He then explains how that the Iron Mountain R. R. Co. had issued to Alphin & Lake Cotton Co. bills of lading at Little Rock for cotton to be shipped out of the compress. He was agent for that road also. That at times there were bills of lading outstanding of this kind for more cotton than there was in the compress. He was frequently urging the compress company and Alphin & Lake cotton company to ship out cotton on these bills of lading. But he knew that there was cotton enough on hand to meet the outstanding bills of lading issued by the

Arkansas Southern Railroad Company. *That is, cotton belonging to Alphin & Lake Cotton Co., and Lake said he would have more than enough to cover everything.* He counted the cotton in the compress several times and found it very far behind and notified Bragg, the freight agent of the Iron Mountain road, at Little Rock. In making these counts he counted the cotton on Faulkner's platform. He did this *because "Lake said it was his cotton, but found out when they failed that there was not any of it his."* Including the cotton on Faulkner's platform the cotton was short. (Printed Trans. 68-69.)

The cotton in the compress was what he expected to meet the bills of lading issued by the Iron Mountain Railroad. He made out the little book by which the cotton was checked up by Wright when delivered to the compress *from the way bills. Had the way bills before him.* (Printed Trans. 70.)

On re-examination by counsel for the railroad company, he testified as follows:

Q. "Explain to the jury what you meant in each of your answers when you said the cotton was billed to the Alphin & Lake Cotton Co.?"

A. *"The waybill we received was billed care of the Compress, notify Alphin & Lake Cotton Co."*

Q. "What you meant was that they were the parties to notify?"

A. "Yes sir."

Q. "What did you mean by that answer: 'Q. Was not it all billed to Alphin & Lake that went in there?' A. 'Yes, sir.' "

A. *"The cotton was billed care of the Compress Company, notify Alphin & Lake Cotton Co."*

Q. "Why did you make that statement what do you mean by this answer: Q. 'Was it not all billed to Alphin & Lake that went in there?' A. 'I understand it was billed that way.' Q. 'What do you mean by being billed?' A. *'The waybills I received.'* Q. 'What did the waybills say?' "

A. *"Care of the compress, notify Alphin & Lake Cotton Co."* (Printed Trans. 71.)

He again repeats (Printed Trans. 73-75), that there was always in the compress enough cotton *that Lake said was his to meet the outstanding bills of lading of the Arkansas Southern R. R. Co.* He does not pretend that it was the cotton represented by these bills of lading. He says (Tr. p. 74) that he was continually urging the compress people to ship out cotton to meet the bills of lading issued by the Iron Mountain Railroad Co. and *that cotton delivered to the compress one day might be shipped out the next day on bills of lading issued by the Iron Mountain road.*

Now if Hutchinson understood that this cotton all belonged to Alphin & Lake Cotton Co.; that it was all claimed by that company; that it was being shipped out

as fast as possible to meet bills of lading issued to that company by the Iron Mountain road; if he understood that "Care of Compress. Notify Alphin & Lake Cotton Co." meant that the cotton was billed to that company and delivered it as billed, how can any other conclusion be reached upon the testimony alone of Hutchinson than that the cotton was delivered to the compress company for and to the account of Alphin & Lake Cotton Co?

Some stress is put upon the fact that the little book now has on it the initials S. O. meaning shippers order, but it is clear from the testimony of Hutchingson alone that this was put upon the book after it had been O. K. 'd by Wright. Hutchinson admits this at pages 75, 76, 77 of the printed transcript. He says that the initials are written in a different hand, or different writing and pencil; that the book was written up from the *waybills*. The waybills do not show anything of the kind. (Tr. p. 78.) Besides, the book (Printed Trans. 79), shows that these initials were placed against no shipments except those from Bernice—indicating that the book had been changed for a purpose.

But if there could be any doubt on this question Wright's testimony (Printed Trans. 79-83), removes it entirely. He says that all the cotton which was shipped in over that railroad was shipped in by Alphin & Lake Co., and went to the account of said company. (Printed Trans. 79.) That it was understool to be the property of that company *both by himself and Hutchinson*. That

it was all shipped out by Alphin & Lake Co. (Printed Trans, 81.) That the little book did not have S. O. in it when he checked it up and O. K. 'd it. (Printed Trans. 80, 81.) And that he never saw any of the waybills. Lake sometimes sent bills of lading to him, and sometimes to Hutchinson, that they all should have gone direct to Hutchinson. Hutchinson never gave him any instructions to take up bills of lading. It was a request to Lake, if he made any. (Printed Trans. 83.)

Learned counsel quote from our brief in the Supreme Court of Arkansas to show that we relied in that court upon the statute alone, but he fails to state that the burden of our argument was to show that aside from the statute the railroad company was liable upon the facts. At the risk of being tedious we beg to repeat here what we said in argument in the Supreme Court of Arkansas.

ARGUMENT.

I.

It is contended by learned counsel for the railroad that by reason of the words "care of compress" in the bills of lading, a delivery of the cotton to the compress was a literal performance of the contract contained in the bill of lading, and released the railroad from all responsibility. This contention is based largely upon the fact that "the railroad had no warehouse, yards, or other facilities for storing cotton there," etc.

This, in our minds, is a potent argument against the contention of counsel. It was the duty of the railroad to provide a place where cotton or other property carried by it might be safely kept, after being unloaded. And if the consignee was not present to receive the property on the platform, it was the duty of the railroad to notify him, and if he could not be found to store it in a safe place, and exercise at least reasonable care to preserve it from loss, and to deliver it to the proper person. The object of the bills of lading was not to represent the cotton merely while in transit, but until delivery.

North Pa. R. R. Co. v. Com. Nat. Bank, 123 U. S. 734-755.

Merchants D. & T. Co. v. Merriam, 111 Ind. 5.

Blumenthal v. Brainard, 38 Vt. 402.

Bank v. Bissel, 72 N. Y. 615.

Railway v. Newell, 60 Ark. 375.

The Titania, 124 Fed. 975.

Wilson v. Cal. Cent. R. Co. 29 Pac. 861.

But the railroad did not even have a platform on which the cotton could be delivered. It had no other place at which the cotton could be delivered or unloaded from the cars, than the compress. All its cotton was delivered at the compress. Now, it is not to be presumed that the shipper intended to waive this plain duty on the part of

the railroad, and release it from all liability by delivery to the compress company alone.

Russell & Ames v. Livingston, 16 N. Y. 518.

Counsel are mistaken when they say: "The written words in the bills of lading were inserted by the agents of the shipper, under directions from Alphin & Lake." It is true the bills of lading were made out by the weighers or keepers of the cotton yards who seem to have been working in harmony with both Alphin & Lake and the railroad. But they were no more the agents of the one than the other. Mr. Fuller, the cashier of the Bank of Bernice, whose deposition was used by the railroad, says that the bills of lading were supposed to be to shipper's order, but that he gave no instructions that the cotton was to be billed care of the compress, and did not know that that was on the bills. (Tr. p. 58.)

The most that can be claimed by the railroad on account of the words "care of compress" is, that it was a proper place for the railroad to store the cotton in the absence of storage facilities of its own; that in storing the cotton there the railroad would be relieved simply from any charge of negligence in selecting a place for storage, and that the compress company and the railroad had some kind of arrangement by which the compress was to be used for their mutual benefit. In fact, it is a matter of common knowledge that railroad and compress companies have such arrangements at all points where cotton is concentrated for

compression, and the holders of bills of lading had a right to assume that some such arrangement existed in reference to the cotton in controversy.

If the contention of counsel be correct, it renders nugatory that provision of the bill of lading, which provides that the cotton shall be delivered to the order of the shipper. By this provision the railroad was bound to deliver the cotton to no one who had not the order of the shipper. It was no excuse, for a delivery to another, that the endorsee of the bill of lading was unknown, absent, or could not be found after diligent search. That would only authorize the railroad to store the cotton and await the presentation of the bill of lading by the proper party. The liability of the railroad after storing the cotton would shift from that of a carrier to that of a warehouseman, and the compress company would be treated as the agent of the railroad, not as the agent of the holder of the bill of lading. The contract is not accomplished until delivery.

The Thames, 14 Wall. 98.

North Penn. Ry. Co. v. Com. Bank, 123 U. S. 735.

Wells-Fargo Co. v. Oregon & Co. 32 Fed. 54.

Walters v. Western Co. 66 Fed. 868; 63 Fed. 393.

Merchants D. & T. Co. v. Merriam, 111 Ind. 5.

Railway v. Nevill, 60 Ark. 375.

Stone v. Chicago, M. & St. P. Ry. Co. 65 N. W. 29.

Furman v. Union Pacific R. R. Co. 106 N. Y. 579.

Watson v. Hoosac Frt. Line, 13 Mo. App. 263.

Wilson Sewing Machine Co. v. L. & N. R. Co. 71 Mo. 203.

Wilson v. California R. Co. 29 Pac. 861.

The clause in this bill of lading quoted by counsel for the railroad in their brief at pages 13 and 14 (Tr. p. 31), conforms to this idea. It provides that the railroad will only be liable as warehouseman after arrival of the cotton, and unless removed by the consignee within twenty-four hours after the arrival, the cotton may be removed by the company at owner's risk and expense in the warehouse of the company, *or one of its selection,* and may after sixty days sell it to pay charges.

Hutchinson on Carriers, Sec. 488.

Wright & Cotton v. Warner, 58 N. E. 1082.

In this case, however, the cotton was delivered to the compress company for Alphin & Lake Cotton Co. at once, and Alphin & Lake Cotton Co. paid the freight on presentation of the freight bills by the railroad.

The clause that limits liability to time of arrival is invalid.

Railway v. Cravens, 57 Ark. 112.

Railway v. Spann, 57 Ark. 127.

Pac. Ex. Co. v. Wallace, 60 Ark. 104.

24 S. E. 166.

If the delivery to the compress company was all that was required of the railroad, and it was thereby discharged, then in effect the compress company was the consignee, and the bills of lading were nothing more than what are called straight bills, and the words shipper's orders were simply superfluous. But if we give effect to these words, it was the duty of the railroad, if it wished to be discharged from all liability, upon delivery to the compress company, to require a surrender of the bills of lading.

Hutchinson on Carriers, Sec. 130, *et seq.*

All authorities cited by counsel for appellant to support their contention on this point, except one, were cases where the property was shipped straight to a consignee, and the contentions arose between the parties to the bills of lading. They do not apply.

In the case of *First National Bank v. Croker*, 111 Mass. 163, cited by counsel, the bill of lading was to shipper's order. Croker was named as consignee, and the carrier delivered the property to the consignee without taking up the bill of lading. Croker disposed of the goods and was sued by the holder of the bill of lading. The court said:

"The act of the defendant (Croker), therefore, in taking possession of the property, was wholly unauthorized and gave them neither valid title or lawful possession, citing *Allen v. Williams,* 12 Pick. 297. * * * A carrier may be a mere bailee for the consignor, and when by the terms of the bill of lading, goods are to be delivered to the consignor's order the carrier is his agent and not the consignee's." This is an authority for appellee.

The cases cited by counsel decide nothing more than was decided by this court in *Nebraska Mills v. Railway,* 64 Ark. 171-3, where the bill of lading was a straight bill, had not been transferred, and the suit was between the consignor and the railroad which had delivered the property to the consignee without taking up the bill of lading. The court recognizes the difference between a straight and a shipper's order bill of lading, and between one in the hands of the original parties and one which has been negotiated.

If it be admitted that the railroad had the right to divest itself of further liability by delivering the cotton to the compress company, it was required to deliver the cotton for account of the holder of the bills of lading, to be delivered by the compress company only on surrender of the bills of lading, and if it failed in this, it is liable.

Midland National Bk. v. Mo. Pac. Ry. Co., 33 S. W. 521.

Bank v. Bissell, 72 N. Y. 615.

North v. M. & M. Transfer Co. 15 N. E. 782.

Hutchingson v. Ladd, 16 Mich. 493.

Johnson v. N. Y. C. R. Co. 33 N. Y. 610.

Libby v. Ingalls, 124 Mass. 503.

Little Miami R. v. Washburn, 22 Ohio St. 324.

Joslyn v. Grand Trunk Ry. 51 Vt. 92.

Cleveland & C. Ry. Co. v. Potts & Co. 71 N. E. 685.

North Pac. R. R. Co. v. Com. Nat. Bk. 123 U. S. 723.

There can be no doubt but that the railroad failed in its duty in this respect. Wright, the assistant manager of the compress company, says no instructions were given. The cotton was always supposed to belong to Alphin & Lake Cotton Co., and was to be unloaded at once. Both he and the railroad supposed it belonged to Alphin & Lake Cotton Co. (Tr. pp. 79-83.)

Hutchinson, the agent of the railroad company, says: "It was delivered to the compress as soon as it was received" (Tr. p. 60). After it was received it was written up in a little book, which was sent over to the compress, and the compress company checked it up and reported the shortage, if any. He delivered it to the compress because it was billed that way on the waybill (Tr. p. 66).

In delivering the cotton to the compress no other directions were given than that contained in the little book. Nothing was ever said about it in any other way. I just delivered it there by that little book and that was all that passed between us (Tr. p. 88). I got my information to make out this little book from the waybills, and followed the waybills in making it out. My bill clerk made out the most of the book. I have not seen the book since it left here. The auditor of the road has had it. I don't know how shipper's order was put opposite the cars. It appears to be written in a different handwriting and a lighter writing and with a lighter pencil than the original pencil, than the original memoranda in the book (Tr. p. 154). I don't know who did that. In the place where I wrote up I may possibly have done that. If I did I checked it from the waybill. I could not say whether or not shipper's order was in the book when Wright signed it. The witness identified the waybills from which he got his information in writing up the cotton book (Tr. p. 105). A copy of one of the way bills was introduced (Tr. p. 108). They were all just alike and none of them contained the words "shipper's order." In this the railroad was at fault. Shipper's order should have been on the waybill. This is conclusive proof that shipper's order was not upon the cotton book when the cotton was delivered to the compress company. It was put there afterwards. Evidently the importance of it was understood. Wright says that no such words or letters were on the book when he signed it. He had noth-

ing to do with the bills of lading. He would merely count the cotton and O. K. the book (Tr. p. 79). A page of the book is exhibited (Tr. p. 79). It only shows like the following:

202	A. S., S-O	O. K. 11-26
24	B-C, Bernice	Wright

This is strictly in accord with Wright's testimony (Tr. pp. 79-83), except that S-O was added after he signed it.

Now, we submit that even with S-O upon the book, there is nothing whatever by which the compress could keep account of the cotton for the holder of the bill of lading. There is nothing to show who was the consignor or the consignee. But if that had appeared, it would not have been sufficient directions for the guidance of the compress company, and with "shipper's order," left off there can be no pretense that the compress company had any directions to treat the cotton other than belonging to Alphin & Lake Cotton Co., as was done.

Not only did the railroad fail in its duty to give proper instructions to the compress company, to hold *for account of the holder of the bill of lading*, but it in fact delivered the cotton to the compress company *for account of Alphin & Lake Cotton Co.* It was a delivery to Alphin & Lake Cotton Co. Wright says: Alphin & Lake Cotton Co. were the only shippers who locaded cotton into

that point. It was sent there for concentration and working up. They were the only people who shipped cotton to that point. All the cotton delivered at the compress by the railroad went to the account of Alphin & Lake Cotton Co. (Tr. p. 80.) *Alphin & Lake Cotton Co. got all the cotton that was delivered there by the railroad, and all the cotton delivered to the company was shipped out by Alphin & Lake Cotton Co.* (Tr. p. 81).

They had been shipping cotton in that way for three years, and he (Hutchinson) never said anything to me about it while I was down there; except on one or two occasions, he said something about some of those shipper's order bills of lading, and told me to call Mr. Lake up about it. I knew nothing about it, and had nothing to do with it. The cotton would be in the yard. I asked if he had any cotton in the yard for us, and he said there was some cotton in the yard that he wired Mr. Lake to send the bills of lading. * * * It had not been kicked into the press. He never said anything to me about cotton that was delivered in on the press switch to be unloaded into the press. None of the waybills were ever shown to me or delivered to me when the cotton was delivered into the press. That little book was used instead of that. It was all we had; we kept that between us as a matter of convenience. Turrentine used it in checking up his compress receipts. I never saw the waybills. He (Lake) would sometimes send the bills of lading to Turrentine, and sometimes to me, and sometimes to Hutchinson. No instructions were

ever given to me by Hutchinson to take up the bills of lading before shipping out the cotton. Those things should really have gone to Mr. Hutchinson and not to me. Mr. Hutchinson never made any request to me about bills of lading, other than those I have just mentioned. It was a request, if he made any to Mr. Lake (Tr. pp. ~~113-119~~ 83).

Hutchinson, the joint agent of the Arkansas Southern Railroad and the St. Louis, Iron Mountain and Southern Railroad at El Dorado, first said (Tr. p. ~~85~~ 63-6-70): The cotton was delivered to the compress company as billed. If this be true, then it was not delivered to shipper's order, because the waybills did not show to shipper's order. And the cotton book had neither shipper's order, care compress, nor the name of the consignor or consignee upon it. It is evident that Hutchinson, knowing that all the cotton that came to that point, as stated by Wright, was shipped in and shipped out by Alphin & Lake Cotton Co., treated the cotton as the property of Alphin & Lake Cotton Co., and did not think it necessary to give any instructions or deliver to the compress any record or information other than the car, number of bales and place from which it was shipped, and Wright, knowing the same thing, did not consider it necessary to do anything more than to count the number of bales in each car and O. K. the book. Hutchinson was asked (Tr. p. ~~86~~ 69):

Q. "For whose account was it delivered?"

A. "*For both;* they would bring the bills of lading."

Being asked in reference to his testimony concerning Alphin & Lake Cotton Co.'s bankruptcy, he answered as follows:

Q. "Did you make this statement in answer to the following question: 'Most of the cotton coming in over the Arkansas Southern Railroad went into the compress?' To which you answered: 'Yes?' "

A. " 'I stated that.' "

Q. " 'It went then to Alphin & Lake's account?' "

A. " 'If I remember right all the cotton billed to the Alphin & Lake Cotton Co. went to the compress, *if I remember right, all was billed that way.*' "

A. " '*Yes, sir; I stated that.*' " (Tr. p. 66)

Q. " 'Did you not make the following answers to the questions: 'Q. Did not most of the cotton billed over the Arkansas Southern Railroad go into the compress?' A. 'All that came over the Arkansas Southern Railroad went into the compress.' Q. 'Was it not all billed to Alphin & Lake that went in there?' A. 'Yes.' "

A. *"It went in there the way it was billed."*

Q. "Did you make the following answer to the questions: Q. 'All that came in over the road and went into the compress was billed to them?' A. 'Yes, sir; that is true?' "

A. "Yes, sir."

Q. "Did you make the following answer to the following question: Q. 'And went into their account then?' A. 'Yes, sir, I suppose so.' Was not that the way you answered it?"

A. "I suppose it was."

Q. "You were better informed then and it was fresher in your mind?"

A. "Yes, sir (Tr. p. 87)."

Now, here is his testimony while the matter was fresh in his mind, that all the cotton coming in over the railroad went into the compress. It was billed to Alphin & Lake Cotton Co., and went into the compress to the account of Alphin & Lake Cotton Co. Whether he be accurate about the billing or not it shows that he understood the cotton to belong to Alphin & Lake Cotton Co. and that it was delivered to them. If there could be any question as to this, all doubt is removed by his testimony, which follows:

Q. "From whom did you collect the freights?"

A. "From Alphin & Lake Cotton Co."

Q. "On the freights coming in?"

A. "Yes, sir."

Q. "How soon after the cotton was delivered?" (Tr. p. 87.)

A. "I usually collected every Monday and sometimes during the week."

Q. "You collected the freights on the cotton in controversy now in the same way?"

A. "All but one car, I think; I paid it myself because I could not get it out of the Alphin & Lake Cotton Co."

Q. "But you did not present the freight-bill to the Alphin & Lake Cotton Co. for this cotton?"

A. "I drew on them at Little Rock through the Bank of El Dorado."

Q. "Those bills showed the car numbers and stated you were drawing for the freights?"

A. "Yes, sir."

Q. "And it was for the specific cotton involved in this case?"

A. "Yes, sir."

Q. "That was done each week?"

A. "Yes, sir."

Q. "About every Monday?"

A. "Yes, sir; always on Monday and sometimes during the week."

Q. "In delivering the cotton to the compress company, were there any other directions given to them than that contained in this little book you have?"

A. "No, sir; I think not."

Q. "Nothing was said about it in any other way?"

A. "No, sir."

Q. "You just delivered it there by that little book and that was all that passed between you (Tr. p. ~~88~~ 67)?"

A. "Yes, sir. I asked the compress several times if they had bills of lading and sometimes they turned them over."

Q. "Who was the person that turned them over to you, as a rule?"

A. "Mr. Lake."

Q. "You looked to him to deliver you the bills of lading?"

A. "Yes, sir; but I received a great many from the compress."

Q. *"It was always expected by you that Lake would produce to you the bills of lading?"*

A. *"Yes, sir"* (Tr. p. ~~89~~ 67)

Here, then, we have not only Hutchinson's declaration that the cotton was delivered to the compress to the account of Alphin & Lake Cotton Co., but what is stronger, we have his own acts showing that he understood it to be the property of Alphin & Lake Cotton Co. But we have his own admission that he so understood it, he says (Tr. pp. ~~93-94~~ 66-67):

Q. "Why did you present the freight bills to Alphin & Lake?"

A. "Lake told me the first of the season to draw on him through the bank for all freight. The cotton was billed, Notify Alphin & Lake."

Q. "You drew on them for all the freight?"

A. "Yes, sir."

Q. "You understood from him that it was his cotton?"

A. "I supposed it to be."

Q. "Don't you know he would not pay the freight on anybody else's cotton?"

A. "It did not look reasonable."

Q. "Is it not a fact that the freight followed the cotton right along, you would follow it right along with freight-bills?"

A. "I collected every Monday."

Q. "For the specific cotton?"

A. "Yes, sir."

He tries to break the force of this testimony at page 89 of the transcript, when he is asked:

Q. "Did you ever require the compress company or any other one to deliver you a bill of lading when you delivered the cotton to the compress company?"

A. "Not at the time it was delivered. No, sir. But the compress company knew the cotton was not to go out until the bill of lading was turned in."

Q. "How did they know that?"

A. "Mr. Lake was president of the compress and Mr. Wright had been getting bills of lading and giving them to me."

Q. "Did you not know that cotton was going out without bills of lading being produced?"

A. "No, sir; we had it going in and coming out all the time, and I supposed there was enough there to cover that."

Q. *"You were looking to Lake for that?"*

A. *"Yes, sir."*

Q. *"You gave no directions to them not to let the cotton go out without bills of lading?"*

A. *"No, sir."*

Q. *"You never demanded these bills of lading of the compress company when the cotton went in there?"*

A. *"No, sir."*

Q. "Mr. Wright brought you some bills of lading afterwards?"

A. "Yes, sir (Tr. p. 67)."

Q. *"That, then, is why you say the compress company knew that—was it not going out without bills of lading being produced?"*

A. *"Yes, sir."*

Q. *"But you were looking to Lake all the time for that?"*

A. *"Yes, sir."*

If he was sincere about his statement that the compress knew that the cotton was not to go out until the bills of lading were turned in, this is a mere supposition on his part. The fact that Wright, the manager, turned in some bills of lading is no proof that he knew it. He says he had no instructions, whatever; that the cotton was received for the account of Alpain & Lake Cotton Co. and was shipped out by that company. That while some bills of lading were sent him and some to Hutchinson by Lake they should all have gone direct from Lake to Hutchinson, and Hutchinson says he looked to Lake for bills of lading. He says himself that the cotton was delivered to the compress for account of Alphin & Lake Cotton Co., and he must have known that if such was the case it was a delivery to Alphin & Lake Cotton Co. when it went into the compress, and that Alphin & Lake Cotton Co. could ship it out as they pleased without taking up the bills of lading. He knew also that while Lake was president of the compress company, he was also president of the Alphin & Lake Cotton Co., and that Alphin & Lake Cotton Co. owned

the compress; and that Lake was in Little Rock while Wright had charge as manager of the compress. In depending upon Lake to get up the bills of lading he simply made Lake the agent of the railroad, or imposed in him a confidence to protect the railroad against the consequences of its neglect. This is all the excuse he can give for the failure of the railroad to take up the bills of lading, and its weakness carries the death sentence to the contention of counsel.

But this is not all. Hutchinson, as the joint agent of the two roads, knew what was going on over both roads, and what was also going on at the compress. He knew that the cotton all went into the compress to the account of Alphin & Lake Cotton Co. and was shipped out by that company. Hear him (Tr. p. 68):

Q. "What road took out or over what road was the cotton shipped out that went into the compress?"

A. "Last season it all went out over the Iron Mountain."

Q. "Bills of lading were issued on compress receipts of this company, were they not?"

A. "Yes, sir (Tr. p. 68.)"

Q. "At times there were bills of lading outstanding that had been issued by the Iron Mountain Railroad for more cotton than was in the compress, was there not?"

A. "Yes, sir."

Q. "You were frequently urging the compress company and Alphin & Lake Cotton Co. to ship out the cotton on the bills of lading held (issued) by the Iron Mountain, were you not?"

A. "Yes, sir; and lots of times we had more cotton than we had bills of lading for, and again we were short."

Q. "Was it not during last fall you were urging them frequently to ship out cotton?"

A. "Yes, sir."

Q. "And did you not ascertain there was not cotton on hand to meet the bills of lading?"

A. "Yes, sir; several times."

Q. "About what time did you make the request?"

A. "I could not give you the dates, off and on through the entire season."

Q. "How many times did you count to ascertain if there was cotton enough there to meet the bills of lading?"

A. "I could not say (Tr. p. 69)."

Q. "That was a frequent occurrence?"

A. "Yes, sir."

Q. "You were delivering cotton to the compress company without taking up bills of lading during the time you were short on cotton, and all through the season?"

A. "Yes, sir."

Q. "And the fact that you knew that there was not cotton enough there to meet the bills of lading did not change your course with reference to delivering cotton?"

A. "*No; but the cotton on hand belonged to Alphin & Lake and Mr. Lake said he would have more than enough to cover everything.*"

Q. "Did you not count along through the season, say November and December, and see there was not enough cotton there?"

A. "Yes, sir, several times; it would be short one week and may be over the next week."

Q. "Did you not write to Mr. A. R. Bragg to that effect?"

A. "Yes, sir."

Q. "Did you not write one time that you were very far behind?"

A. "Yes, sir."

Q. "How far behind, then?"

A. "All the way from—well, I could not say how far; could not give you the amount."

Q. "In counting the cotton to see whether or not there was a shortage, did you simply count the cotton in the compress or the cotton on Faulkner's platform also (Tr. p. 69)?"

A. "At times both places and again just in the compress."

Q. "Why did you count Faulkner's?"

A. "Because *Lake said it was his cotton*, but I found out when they failed that there was not any of it his."

Q. "In counting Faulkner's you found they were short?"

A. "I do not know. *I would ask Lake how much cotton they had on hand and I would find it short,* and notify Mr. Bragg, who issued all the bills of lading."

Q. "You found out that Faulkner's cotton was not Alphin & Lake's cotton?"

A. "Yes, sir; when they failed."

Q. "Were you not continually urging the compress company to load the cotton on the Iron Mountain cars?"

A. "Yes, sir."

Q. "That compress was the place you expected the cotton to be supplied to meet the Iron Mountain bills of lading?"

A. "Yes, sir."

Q. "The compress cotton was the cotton you expected to meet the bills of lading?"

A. "Yes, sir."

On redirect examination he was asked by counsel for the railroad what he meant by saying the cotton was billed to Alphin & Lake Cotton Co., and he answered that: "The waybill we received was billed care of the compress, notify Alphin & Lake Cotton Co." (Tr. pp. 70-71.)

Now, whatever construction the court may put upon these words and these waybills one thing is settled beyond question, and that is that Hutchinson took them to mean that the cotton was billed to Alphin & Lake Cotton Co., and treated the cotton as the cotton of Alphin & Lake Cotton Co., both before delivery to the compress and afterwards. Hence he delivered to the account of Alphin & Lake Cotton Co., and looked to Lake to produce the bills of lading; and counted the cotton in the compress as the cotton of Alphin & Lake Cotton Co. and took Lake's word that it belonged to Alphin & Lake Cotton Co.

He was further asked by the counsel for the railroad (Tr. p. 73):

Q. "You say that at the time this cotton was being delivered to the compress company, the Iron Mountain issued bills of lading in excess of all cotton there, and you counted the cotton, and about that *did you ever ascertain there was not enough cotton there to satisfy the bills of lading outstanding of the Arkansas Southern Railroad?*"

A. "*No, sir; I never counted the cotton to see that. I had two thousand bills of lading on hand signed by the*

Iron Mountain, and if I did not have that much cotton I would notify Mr. Bragg."

Q. "Was there at any time, as far as you know, when *you* did not have enough cotton to satisfy the outstanding bills of lading of the Arkansas Southern?

A. "There was always enough on hand for that."

Learned counsel probably inadvertently put the cotton here in the possession of the Arkansas Southern Railroad, but whether inadvertently or not, he does not better his condition by the following questions and answers (Tr. p. 72):

Q. "Was there ever any time that you know of when there was not enough cotton in the compress to meet all the bills of lading outstanding of the Arkansas Southern?"

A. "There was always enough cotton that *Lake said was his cotton to meet them.*"

Q. "*Did you all the time believe there was enough there to meet the Arkansas Southern's bills of lading?*"

A. "*Yes, sir.*"

Q. "And you believe now if the cotton which was there and which *Lake said was his that there was enough?*"

A. "*Yes, sir.*"

He does not pretend that the identical cotton was there to satisfy these bills of lading.

There is no way to escape the conclusion that Hutchinson delivered the cotton to the compress company as and for the account of Alphin & Lake Cotton Co., and that he simply relied upon Alphin & Lake Cotton Co. to produce the bills of lading. His answers to the following questions show him to be culpable beyond any shadow of excuse (Tr. pp. 74-5):

Q. "Is it not a fact that under the system of delivery of cotton into the compress the cotton you delivered in there one day could be delivered out the next day, say to the Iron Mountain, for further shipment?"

A. "Yes, sir."

Q. "Is it not a fact that you were after the compress people continually to load compressed cotton under bills of lading you held then?"

A. "Yes, sir."

Q. "And they were loading as fast as they could the cotton that was compressed?"

A. "Yes, sir." * * *

Q. "You permitted cotton from the Arkansas Southern to go in without the surrender of the bills of lading?"

A. "Yes, sir."

Q. "As soon as that was compressed you were urging them to load it out under bills of lading issued by the Iron Mountain?"

A. "I was urging them for out shipments."

Q. "You were urging them to ship it out under bills of lading that had been obtained from the Iron Mountain?"

A. "Yes, sir."

Q. "When you made the statement that you supposed there was enough to meet the bills of the Arkansas Southern, you had reference *to all the cotton on their platform and Faulkner's?*"

A. "Yes, sir."

Q. "You did that without inquiring from Faulkner whether the other people owned that cotton?"

A. *"I took Lake's word for it.* * * *"

Q. "When you became uneasy at different times and went to see how much cotton was on hand and counted it, did you not approximate all the cotton in the compress and on Faulkner's platform (Tr. p. 75)?"

A. "Yes, sir."

Q. "And you included in that a great deal of local cotton?"

A. "I included all the cotton Lake said was his. * * *"

Q. "When you counted or estimated the cotton, did you see if there was enough to fill these outstanding bills of lading? You knew there were bills of lading outstanding that had not been surrendered?"

A. "Yes, sir; but I didn't know there were as many as there were because I kinder lost track of them."

Again, if the railroad discharged its obligation when it surrendered the cotton to the compress company, and if the compress company assumed that duty, what had the railroad to do with the bills of lading? Why should it depend upon Lake to surrender the bills of lading? Would not the bills of lading properly belong to the compress company as vouchers against the claim of any one that might be presented for the cotton?"

Then follows the additional argument quoted by counsel, which was chiefly in answer to the argument made by counsel for the railroad that *delivery alone to the compress* was a literal performance of the contract.

The Supreme Court of Arkansas in its opinion makes the following finding of the facts in the case upon which it bases its opinion: (Tr. pp. 100-102.)

"The facts in the case are substantially as follows: Alphin & Lake Cotton Co. were dealers in cotton at Little Rock, Arkansas, and were the principal owners of a compress at El Dorado. They purchased cotton at Bernice, La., and at Junction City, Arkansas, and at other places along the road of the railroad company. At Bernice the cotton purchased was paid for by the Bank of Bernice and shipped in its name over the railroad of the defendant to El Dorado, a terminus of the railroad, about thirty miles from Bernice. Bills of lading were issued to

the shipper in which it undertook to deliver the cotton to shipper's order at its destination. They were forwarded to the Bank of Little Rock with drafts on Alphin & Lake Cotton Co. attached for collection. Nine hundred and fifty-one bales of cotton were purchased by Alphin & Lake and shipped in the name of the Bank of Bernice over defendant's road from Bernice to El Dorado. Bills of lading were issued for all of them and forwarded to the Bank of Little Rock with drafts attached in the manner indicated.

"Cotton at Junction City was handled very much in the same way, except that the bills of lading showed Alphin & Lake Cotton Co. as consignor, and the bills of lading, with drafts for the price attached were forwarded to the Bank of Little Rock.

"When the drafts and bills of lading arrived at Little Rock, Alphin & Lake Cotton Co. would draw drafts for the amount on the Bank of Little Rock, which would pay the same by taking up the original drafts for the price of the cotton, and would retain the bills of lading as security for the amounts and all other indebtedness Alphin & Lake Cotton Co. owed that bank.

"The bills of lading were all to shipper's order, care of compress, El Dorado, Ark.; notify Alphin & Lake Cotton Co. The cotton was usually loaded on the cars before the bills of lading were signed, and usually left the shipping station the same or next day after the bills of lading were signed up, and reached El Dorado within twenty-

four hours after it left Bernice and was delivered to the compress company for account of Alphin & Lake Cotton Company.

"The railroad had no warehouse or place for delivery or storage at El Dorado. It only had a joint track with the St. Louis, Iron Mountain & Southern Railroad Co., and the two roads maintained a joint agent, Hutchinson, at that place. The Arkansas Southern Railroad Co. delivered all cotton which came in over its road at the compress. It had no cotton platform, and the compress was the only place it had for the delivery of cotton. Before the cotton was delivered to the compress a memorandum was made of it in a little book by the railroad, showing the initial and number of the car, the number of bales in the car and the place of shipment. The cotton was checked up by Mr. Wright, assistant manager of the compress company, and, if found correct, he wrote 'O. K.', and signed his name on it with the date of his O. K.

"In delivering cotton to the compress company no other directions were given to it than that contained in this little book. Nothing was said about it in any other way. It was just delivered by that little book, and that was all that passed between the parties. It was always supposed to belong to Alphin & Lake Cotton Co. by the compress and railroad, and was unloaded at once. All the compress company did was to count the cotton and O. K. the book as to the number of bales. Neither 'S-O.', meaning shipper's order, nor 'care of the compress com-

pany' was on this little book. 'S-O' appears to be upon the book now, but was placed there after the cotton was delivered. It was not on the waybill from which the book was made up."

The cotton was treated as belonging to Alphin & Lake Cotton Co., and was delivered without taking up the bills of lading.

"On December 6, 1902, Lake applied to the German National Bank, which advanced $17,806.00 on bills of lading for 558 bales of cotton, and on December 11th the bank advanced $19,200.00 on bills of lading for 441 bales, with the understanding that the bills of lading first delivered should also stand for the last advancement. At the time Lake applied for the first advancement, the bills of lading were in the hands of the Bank of Little Rock. He stated that the Bank of Little Rock had required Alphin & Lake Cotton Co. to reduce its account, and a draft was drawn by the company upon the bank in favor of the Bank of Little Rock, with the bills of lading attached, which was presented by and paid to the Bank of Little Rock. At the time the advancement for $19,200.00 was made the bills of lading were the property of the Bank of Little Rock, and Lake was permitted to take them from the Bank of Little Rock to the German National Bank, with the understanding that they or the money for them should be returned to the Bank of Little Rock. The German National Bank issued $10,000.00 in New York

Exchange in favor of the Bank of Little Rock and paid $9,200.00 in cash which Lake and Perry handed to the Bank of Little Rock in lieu of the bills of lading, and the account of Alphin & Lake Cotton Co. was credited with $19,200.00 by the Bank of Little Rock."

The German National Bank lost the cotton. It was delivered to other parties. The bank recovered judgment in this action; and the defendant appealed."

Now we respectfully submit that no candid person can read this statement of facts and say that the court did not find explicitly that the cotton was not only treated as the property of Alphin & Lake Cotton Co. by both the railroad company and the compress company, but was delivered by the railroad company "to the compress company for the account of Alphin & Lake Cotton Company." No person can give the testimony in the case a full and impartial consideration and not come to the conclusion that the court was correct in its findings.

As evidence that we are not mistaken in our conclusion as to what the court did find and what the court did mean, we only have to appeal to the able counsel who tried the case both in the trial court and in the Supreme Court of Arkansas, who filed the motion for rehearing in the latter court which is as follows: (Tr. p. 110.)

PETITION FOR REHEARING.

IN THE SUPREME COURT OF ARKANSAS.

ARKANSAS SOUTHERN RY. CO.....*Appellant,*

vs. No. 60.

GERMAN NATIONAL BANK.....*Appellee.*

PETITION OF APPELLANT FOR REHEARING.

"Comes the appellant, the Arkansas Southern Railway Co. and petitions the court to reconsider its judgment heretofore rendered herein and for cause says:

"That the judgment of the court affirming the decision of the circuit court of Union county is based upon the finding of fact by the court that the Arkansas Southern Railway Co. delivered the cotton in controversy to the El Dorado Compress Co. for account of Alphin & Lake Cotton Co. *Upon this finding of fact the court concludes, that while the said railway company was relieved of liability on account of the storage of said cotton,* it was liable on account of a failure to deliver according to law. Appellant insists that there was error *in the finding of the court, that the cotton was delivered to the account of the Alphin & Lake Cotton Co.,* (italics ours) and insists that under the testimony in the case as will be seen in the transcript and in its abstract filed herein, as also in its statement of facts in its brief, it appears that said cotton was delivered by it to the El Dorado compress company as stated by the witness Hutchinson, as billed; that is, it was delivered to the

compress company under the direction in the bill of lading 'care of the El Dorado Compress Company.'

"Appellant further says that there is error in the judgment of the court in not reversing the judgment of the lower court and in not directing the lower court to submit to a jury the question as to whether or not the cotton in controversy was stored by the appellant with the said compress company to the account of Alphin & Lake Cotton Co. because it says, that even if it be true that the witness Hutchinson had stated on an occasion prior to the time of his testimony herein that he supposed the cotton had been placed in the compress to the account of Alphin & Lake Cotton Co. it is error that such a statement should be treated as a confession binding on appellant, it being admissible only as a matter of impeachment and the effect of it being purely a question for a jury.

"Appellant further says that there is error in the judgment of the court in its failure to reverse the judgment of the lower court for the error set forth in the 28th ground of the motion for a new trial filed by the appellant in the lower court.

"For further ground for the rehearing appellant says that the court in applying the statutes of Arkansas under the chapter 'Bills of Lading, Receipts, etc.,' being Chapter Fifteen of Kirby's Digest of the Statutes of Arkansas or any section or provision thereof to the decision of this case because the statute so applied and each and every provision

thereof so applied is in violation of the clause of the constitution of the United States giving to the Congress of the United States the power to regulate commerce between the several states of the Union and is therefore void as applied to this cause and the court erred in giving any effect to such statute or any part thereof, effect in this case.

"It further *says that the basic question underlying the judgment of the court is, whether the cotton in controversy was delivered to the compress company by the railway company to the account of Alphin & Lake Cotton Co. or for storage*, and it says that this question is one of fact, the correct answer to which depends upon many facts and circumstances in evidence as well as the direct testimony of witnesses. That from the circumstances in evidence, and the testimony of the witnesses directed to that question, the minds of reasonable men may draw different conclusions. Wherefore, it says that the same is a jury question, and there is error in depriving appellant of the right to have the same passed upon by a jury.

"Rose, Hemingway & Rose,

"Gaughan & Sifford,

× See ninent "*For Appellant.*"

This is explicit and the able counsel who signed and filed it could not have been mistaken as to what the court had decided. But this is not all. Learned counsel who now appears before this court in behalf of the railroad company and who signed and filed the assignment of errors

in this case bears testimony on this point, which should be convincing even to himself. Hear him, (Printed Trans. 2) when in his "6," "7" and "8" assignments of error he says:

"6. The Supreme Court of Arkansas erred in holding and deciding that the defendant railroad company did not comply with its contract by delivering to the compress company the cotton described in each bill of lading sued upon herein representing cotton shipped from Louisiana to Arkansas.

"7. The Supreme Court of Arkansas erred in finding, holding, and deciding that the cotton described in the bills of lading representing cotton shipped from Louisiana to Arkansas sued upon herein was 'delivered to the compress company for account of Alphin & Lake Cotton Company.'

"8. The Supreme Court of Arkansas erred in finding, holding and deciding as to shipments from Louisiana to Arkansas that, 'in delivering cotton to the compress company, no other directions were given to it than that contained in this little book. Nothing was said about it in any other way. It was just delivered by that little book, and that was all that passed between the parties. It was always supposed to belong to Alphin & Lake Cotton Company by the compress and railroad, and was unloaded at once. All the compress did was to count the cotton and O. K. the book as to the number of bales. Neither S.-O.,

meaning shipper's order, nor care of compress company was on this little book. S.-O. appears to be on the book now, but was placed there after the cotton was delivered. It was not on the waybill from which the book was made up. The cotton was treated as belonging to Alphin & Lake Cotton Co. and was delivered without taking up the bill of lading."

The question upon the facts was argued before the Supreme Court of Arkansas, upon the motion for rehearing by both sides, along the same lines as in our original brief, and the court without further opinion, and without a dissenting voice overruled the motion. (Printed Trans. 100.)

Independent of the statute, the court under the facts as found could not have done otherwise than give judgment for the bank. If as found by the court the cotton was on its arrival at El Dorado, delivered to Alphin & Lake Cotton Co. or for its account, this at once fixed the liability of the company, according to an unbroken line of authorities.

North Penn. Railroad Co. v. Commercial Bank of Ohio, 123 U. S. 727.

The Thames, 14 Wall. 98.

Hutchingson on Carriers (2 Ed.), § § 129, 130.

Daniel on Negotiable Instruments, § § 1728, 1731.

The Titans, 124 Fed. 975.

Blumenthal v. Bainerd, 38 Vt. 402.

Walters v. Western & A. R. Co., 66 Fed. 866.

Midland National Bank v. Mo. Pac. Ry. Co., 33 S. W. 521.

Bank v. Bissell, 72 N. Y. 615.

Joslyn v. Grand Trunk Ry., 51 Vt. 92.

In *North Pa. R. R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, the shipment was cattle by "shippers' order" bills of lading, "notify J. W. Blaker," as here. On arrival at Philadelphia the cattle were immediately delivered by the railroad to the "North Philadelphia Droveyard Company, which was formed for the business of receiving, taking care of and delivering live stock to their owners or consignees, and put in pens used by the Blakers. This company notified the Blakers of the arrival of the cattle, and delivered them to those parties. The cattle were delivered by the railroad company to the droveyard company without any direction to hold the cattle subject to the order of the consignee, who was also the owner and shipper. There, as here, the suit was for nondelivery of the property to the order of the shipper. There, as here, it was attempted to show that numerous shipments of that kind had been delivered to the Blakers in the same way. There, as here, the court directed a verdict for the plaintiff. There, as here, it was argued that the railroad discharged its duty by delivering to the droveyard company. The court held that the railroad was not discharged. It said:

"The railroad company, defendant below, should therefore have given necessary instructions to the drove-yard company, *which was its agent for the custody and care of the cattle* [italics ours] respecting their delivery—that it should be made only upon the order of the consignee, who was also the owner and shipper."

To the same effect is *The Thames*, 81 U. S. 14 Wall. 98, cited with approval in the above case. The shipment there was cotton. It was urged that the holder of the bill of lading was negligent in not demanding the cotton until after two weeks from its arrival, but this contention was not sustained.

These and other cases cited in our former brief, it seems to us, should silence all contention as to the right of the railroad by storing bulky articles to be relieved from the obligations of a warehouseman. The court recognizes no such distinction.

In *The Titania*, 124 Fed. 975, the property sued for was 1,500 bales of hemp. The court said:

"The claimant claims that they were delivered on the wharf and their loss was due to the delay of the libelants in taking them away. It is true that a carrier does not remain under the very strict liability of a carrier after a delivery on the wharf, notice to the consignees, and a reasonable time for the consignees to take the goods away; but the carrier, after such time, is not justified in failing to exercise reasonable care for the preservation and protec-

tion of the goods. He is no longer charged with the strict liability of a carrier, *but he is charged with the liability of a warehouseman, or bailee*, having the duty of exercising reasonable care and attention to prevent loss or injury to the goods."

Colgate v. Pa. R. R. Co., 102 N. Y. 120, was oil.

Midland National Bank v. Mo. P. R. R., 33 S. W. 521, was grain.

Joslyn v. Railway, 51 Vt. 92.

In *Hutchingson v. Lad*, 16 Mich. 493, goods were shipped to be delivered to an express company, with instructions to deliver upon receiving balance due—the instructions were not given and the forwarder was held liable.

North v. Merchants & M. Trans. Co., 15 N. E. 779. 503.

Little Miami R. R. Co. v. Washburn, 22 Ohio St. 324.

The Supreme Court of Arkansas after making the finding of facts, above quoted, proceeds at once in its opinion to state the rule at common law as follows:

"At common law a bill of lading is a muniment of title to the goods or property therein specified—is a symbol or representative of the goods—when properly indorsed and delivered, with the intention of passing the title to them, is a symbolic or constructive delivery of the goods

themselves; and when assigned the carrier, having notice of the assignment, becomes bound to deliver the goods to the assignee. If the goods, by the terms of the bill of lading, are deliverable to the order of the shipper, the carrier should not deliver except upon the production of the bill of lading properly indorsed by the shipper; 'for this is notice to the carrier that the shipper intends to retain in his power the ultimate disposition of the goods.' *North Pennsylvania Railroad Company v. Commercial Bank of Ohio*, 123 U. S. 727, 734, 736; *The Thames*, 14 Wall. 98; *Hutchingson on Carriers* (2 Ed.), Secs. 129, 130; *Daniel on Negotiable Instruments*, Secs. 1728, 1731.

"The responsibility of the carrier for the goods continues after their arrival at the place of destination, until they are ready to be delivered and the owner or consignee has had a reasonable time and opportunity to examine them and take them away. If they are not called for by the party entitled to them within that time, it is the duty of the carrier to retain them until they are claimed or store them prudently for and on account of their owner. When his responsibility as a carrier ceases he becomes liable for the goods as a warehouseman. He is responsible either as carrier or warehouseman until the goods are properly delivered. The bill of lading is evidence of that obligation. *North Pennsylvania Railroad Co. v. Commercial Bank*, 123 U. S. 727, 734, 736; *The Thames*, 14 Wall. 98; *The Titana*, 124 Fed. Rep. 975; *Blumenthal v. Brainerd*, 38 Vt. 402."

Then the court coming to the question as to the statute, says: "For the enforcement of these duties and the protection of the parties in interest the statutes of this State provide," etc., and after quoting the statute the court continues: "Appellant does not claim that it has delivered the cotton in question in compliance with these statutes, but contends that the statutes are in conflict with the clause of the Constitution of the United States which vests Congress with power to regulate commerce among the States. But they are not in conflict. *It is the duty of the carrier to deliver property specified in a bill of lading to the legal holder thereof. The object of the statutes, and the effect if obeyed, is to enforce this duty and protect the rights of the holder.* (Italics ours.) In the absence of congressional legislation upon the subject, the State can do so."

This shows clearly that the court considered the railroad company liable under the rule at common law aside from the statute and had there been no statute, the decision of the court would have been the same. If this court should declare the statute unconstitutional, it could not change the facts nor the finding of facts of the Supreme Court of Arkansas, and if that court should adhere to its findings, the final result could not be different from that already declared by the court.

If the case had been submitted to the jury upon the evidence with an instruction from the court as to the common law duties of the railroad company, the verdict could

not have been different. There was no conflict in the evidence as to the *facts in the case*. If there is any conflict anywhere it is merely as to Hutchinson's *conclusions, not as to the facts*. Counsel tried to work out the conclusion that the initials S.O. were on the little book when O. K.'d by Wright. But the undisputed fact is from Hutchinson himself that the book was made out from the waybills, and with the waybills before him, and the waybills contain no such initials nor anything to indicate it. He admits that the initials are in different pencil writing and appear to have been written at a different time. He virtually admits that they were so written, while Wright is clear they were not on the book when he signed it.

Hutchinson made a feeble effort to excuse himself by saying that the compress company knew that the cotton was not to be allowed to go out without surrender of the bills of lading, and his only reason for saying that, was that Lake was president and Wright had been getting bills of lading and surrendering to him. This is a mere conclusion, not warranted by the two facts mentioned by him, or any other facts.

The fact that Lake was president of the compress company does not help the railroad. That gave it no right to deliver the cotton as the property of Alphin Lake Company. That did not relieve it of the duty to deliver to the account of the holder of the bill of lading (even if it be admitted that that would have discharged it of further liability). Lake was not the manager of the compress com-

pany. As president his duties were limited. Inherently his powers were no more than any other director in the company, further than to preside at the meetings of the board. The affairs of the company were under the management of the board as such. They could not act individually.

1 *Morawitz on Corporations*, Sec. 537.

Whatever power he had beyond this must have been delegated and special. There is no proof of any such.

City Electric Street Railway Co. v. First National Bank, 62 Ark. 33, 41.

It will be presumed that Wright was placed in charge as manager by the board of directors. He was the one in authority. He denies any notice or knowledge that the cotton was to be held for any other account than that of Alphin-Lake Company. The only pretense that Hutchinson had for saying that Wright knew otherwise is that he "had been getting bills of lading and giving them to me" (~~our original brief, p. 23~~). There is nothing in this to show any such knowledge. He says as a rule Lake delivered the bills of lading (Tr. ~~82~~ 66-67). It is not shown that Lake with such knowledge took part in any transaction of the board. Nor if he had will knowledge on his part be attributed as knowledge on the part of the board. He was as to that acting in an antagonistic position. And it would be monstrous to hold that the compress should be chargeable with his knowledge and his acts.

Washington Bank v. Lewis, 22 Pick. 24.

Stevenson v. Bay City, 26 Mich. 44.

Barnes v. Trenton Gas L. Co. 27 N. J. Eq. 33.

Frenkel v. Hudson, 82 Ala. 158.

60 *Am. Rep.* 736.

4 *Thompson, Corp. Sec.* 5205, *et seq.*

But the very facts admitted by Hutchinson show that he was not sincere in this statement. He says he delivered the cotton as billed—that it was billed to Alphin & Lake Cotton Company. He so understood it because the waybill said: "Care of Compress, notify Alphin & Lake Cotton Company." The same mistake was made in *North Pa. R. R. Co. v. Commercial Nat. Bank*, 123 U. S. 727.

Again Hutchinson knew that the cotton that was delivered to the compress one day might go out the next day on bills of lading issued by the Iron Mountain R. R. Co. to Alphin & Lake Co. He counted all the cotton in the compress and on Faulkner's platform, as Alphin & Lake Cotton Co.'s, to ascertain if there was enough cotton to fill all the bills of lading. Lake claimed it all and he treated it as belonging to Alphin & Lake Co. He did not try to identify any of this cotton. Not a single act of Hutchinson can be pointed to in the record which indicates that he at any time regarded or treated the cotton as belonging to any one else than Alphin & Lake Cotton

Co. Not a single act can be shown that any one connected with either the railroad or compress company regarded or treated the cotton other than as the property of Alphin & Lake Cotton Co. There was no disputed fact to go to the jury. Learned counsel for the railroad company recognized this by asking an instruction for a verdict for the defendant. (Printed Trans. 91.)

"The province of the jury, is not to determine questions of fact about which there is no conflict, and it is unnecessary to submit those questions about which there is no dispute, and which are conclusively settled by the evidence."

Callett v. Ry. Co., 57 Ark. 461.

Had the case gone to the jury and had there been a verdict for the defendant, the trial court would have set it aside; if not the Supreme Court would have done so under the facts found by it.

Learned counsel say: "We remark also that no finding of facts was made or could have been made in the Supreme Court of Arkansas. The sole question presented there, as it is the sole question presented here, was the effect of the statute, the court holding that the effect of the statute was to deprive the defendant of the benefit of its contract, which we maintain would be a complete defense." We beg to remark that counsel in the profuseness of his argument and his zeal for his client must have become so blinded as not to be able to discern the facts of

the case, *or to believe his own testimony* as to the findings of fact by the court. We have already shown, as we believe, that the court not only made an explicit finding of the facts, but that it was clearly sustained by the undisputed evidence of the case.

Counsel is also mistaken when he says the court held that "the effect of the statute was to deprive the defendant of the benefit of its contract."

The court simply *construed* the contract to mean that the railroad must either deliver the cotton to the holder of the bill of lading or store the same for his benefit. This is all that the railroad company claimed for the bill of lading in its answer.

Counsel say: "Independent of the statute, judgment should have gone for plaintiff in error in the event the evidence showed conclusively *any one* of the following facts to be true:

"(a) That delivery was made in accordance with the terms of the bills of lading."

By the answer it was claimed that the cotton had been delivered to the compress as the agent of and for the account of the holder of the bills of lading. The court held that a delivery to the compress for the *account of Alphin & Lake Cotton Co.*, was not a delivery to the compress as agent of the holder of the bills of lading. And as we have seen the testimony fully justifies the finding. This decision is in harmony with the holding of this court.

In *North Pa. R. R. Co. v. Commercial Bank,* 123 U. S. 727, 734, 736, and other authorities cited by the Arkansas Supreme Court.

"(b) That the cotton was stored at the risk of the owner, in accordance with the stipulation in the bills of lading giving plaintiff in error the right so to store, unless called for within twenty-four hours."

To deliver to the compress for the account of Alphin & Lake Cotton Co. at once could not have been a storing at the risk of the owner. The evidence clearly shows that no thought of storing the cotton for anyone entered into the delivery. Hutchinson understood that the cotton was billed to Alphin & Lake Cotton Co., and he delivered it at once at the compress company for Alphin & Lake Cotton Co., without any thought of holding it for twenty-four hours.

"(c) That the cotton was delivered to the compress or to Alphin & Lake, in the manner in which it was delivered, with full knowledge and consent of the then holders of the bills of lading."

There is no evidence to sustain any such proposition. An attempt was made to prove by Hutchnison, a custom of the railroad, as to the manner of delivery but this attempt was overruled by the court. (Printed Trans. 64-5.) An attempt was also made to prove that Alphin & Lake Cotton Co. was the owner of the bills of lading, at the time they were acquired by the Bank but this failed. The

testimony is unquestioned, that Alphin & Lake Cotton Co., never paid a dollar for the cotton. It was all paid for either by the Bank of Bernice (Printed Trans. 46), or by the Bank of Little Rock (Printed Trans. 55), or by drafts drawn in favor of merchants in Bernice who were customers of the Bank of Bernice (Printed Trans. 51, 52), and sent by that Bank to the Bank of Little Rock, and the cotton was shipped in the name of the Bank of Bernice on shipper's order bills of lading. The bills of lading were at once forwarded by the Bank of Bernice to the Bank of Little Rock, which paid the drafts in favor of the Bank of Bernice and its customers. The Bank of Bernice directed that all the cotton be sent to shippers order. It controlled the cotton, did not direct, "to notify Alphin & Lake Cotton Co., care compress." (Printed Trans. 47, 48.) The bills of lading were not made in name of the Bank of Bernice simply for the purpose of securing that Bank. They were also for the security of the drafts in favor of customers for cotton bought of them by Alphin & Lake Cotton Co. and which had been forwarded by the Bank of Bernice to the Bank of Little Rock, and the Bank of Little Rock was also regarded as having an interest in them. (Printed Trans. 54, 55.) See also testimony of Green. (Printed Trans. 33.)

The Bank of Little Rock, held the bills of lading to secure all the indebtedness of Alphin & Lake Cotton Co. to it. (Printed Trans. 41, 42.) On December 6th that company owed the Bank of Little Rock in over draft

$139,658.50, and on December 11th $143,531.97, these over drafts had been running for some time prior to these debts. Learned counsel says: The cashier of the Bank of Little Rock was treasurer of the compress company. He fails to note that the cashier never knew anything about this until after the failure of Alphin & Lake Cotton Co. (Printed Trans. 41.)

The Bank of Little Rock called upon Alphin & Lake Co. to reduce its account. Lake applied to the German National Bank for money with which to relieve his account at the Bank of Little Rock, offering bills of lading held by the Bank of Little Rock as security. He explained that the difficulty in getting cars for handling cotton had compelled his company to borrow more money from his two banks, than they were able to continue. That there was a draft against the company at the Bank of Little Rock which had to be taken up that day. The cashier of the German National Bank told him that the bank would advance the money on shippers order bills of lading, or upon Little Rock compress receipts. Thereupon Lake went to the Bank of Little Rock and Alphin & Lake Cotton Co. drew a draft upon the German National Bank with the bills of lading attached, which were in the hands of the Bank of Little Rock. This draft was presented by the Bank of Little Rock to the German National Bank and certified by it, and the bills of lading were detached, and held by that Bank. (Printed Trans. 26, 28.) See also the evidence of the cashier of the Bank of

Little Rock. (Printed Trans. 41.) This transaction was on December 6th. On December 11th Lake again applied to the German National Bank, and the bank made another advance of money which was delivered to the Bank of Little Rock partly in currency and partly in exchange drawn in favor of that bank. The bills of lading were never in the possession of Lake in any legal sense. As we have seen the first bills of lading taken by the German National Bank came from the Bank of Little Rock with Alphin & Lake Cotton Co.'s draft attached to it. These bills were presented by the Bank of Little Rock with the draft in order to get the O. K. of the German National Bank on the draft. That done the bills of lading were delivered to the German National Bank, and the Bank of Little Rock took the draft. In the next instance Lake was simply permitted to take the bills of lading momentarily, from the Bank of Little Rock with the understanding that the bills or the money would be returned to the Bank of Little Rock. (Printed Trans. 86-7.) The money in both instances was credited upon the account of Alphin & Lake Cotton Co.

There was nothing in all this to put any one on notice that the cotton was being delivered to the account of Alphin & Lake Cotton Co. at the compress, or that it was not being delivered to the compress for the benefit of the holders of the bills of lading.

Learned counsel is mistaken when he says: "At the date the German National Bank acquired the bills of lad-

ing involved in this suit therefor, the cotton covered by those bills had been at destination, from fourteen to nineteen days." The bank took them within a very short time after they were *issued*.

On the first advancement the oldest bill was fourteen days, and the newest three days (Tr. p. 25), and on the last the oldest bill was eight and the newest one day old. (Tr. p. 28.) There is nothing in the age of these bills to put the bank upon inquiry. The bank was not required to make prompt demand or to give notice of the transfer of the bills.

Colgate v. Penn. R. R., 102 N. Y. 120.

Midland Nat. Bk. v. Mo. Pac. R., 33 S. W. 521.

The Thames, 14 Wall. 98.

Besides if it had done so it would not have availed, because the railroad had already made delivery—had already violated its contract. If demand had been made the cotton could not have been produced. And the railroad can not claim excuse for its own wrong.

Davis, the cashier of the bank, says that Lake represented that there was delay in procuring cars (Tr. p. 24), which all who know anything about the movement of cotton know to be often true. And it is a well-known fact that railroads frequently issue bills of lading before the property is loaded, and after being loaded there are not always engines with which to haul the cotton. So Davis had a right to believe what Lake said.

There was nothing in those transactions that would release the bills of lading to Alphin & Lake Cotton Co. The right to them passed direct from the Bank of Little Rock to the German National Bank. It did not pass through the Alphin & Lake Cotton Co. The German National Bank does not have to rely upon the title of Alphin & Lake Cotton Co., even if there were no statute governing the question.

Walters et al v. Western & A. R. Co., 56 Fed. 369.

Walters et al v. Western & A. R. Co., 63 Fed. 391.

Walters et al. v. Western & A. R. Co., 66 Fed. 862.

Pollard v. Reardon, 65 Fed. 848.

Jones on Pledges and Collateral Securities, Sec. 44 *et seq.*

First Nat. Bank v. N. Y. Cent. etc., Ry., 32 N. Y. Suppl. 604.

We deem it unnecessary to follow learned counsel further upon this feature of the case. To recapitulate in answer to his five propositions, which are the same as his (a), (b) and (c), we submit that the testimony is conclusive that the railroad company did not deliver the cotton according to the terms contained in the bills of lading. Even if it be admitted that it had the right to discharge

itself by delivery to the compress, it must have delivered to the compress as agent and for the account of the holder of the bills of lading. There is nothing whatever in the little book O. K. 'd by Wright by which the compress could so identify the cotton as to hold it or make specific delivery on any specific bill of lading. The whole evidence shows that the delivery was practically a delivery direct to Alphin & Lake Cotton Co.

There is nothing to show that the cotton was stored with the compress company per stipulation in the bills of lading giving the right of storage. As we have shown, the undisputed evidence proves that there was no thought of storing the cotton at the risk of anyone. There was no waiting for twenty four hours for anyone to claim the cotton. There is no evidence to show that the cotton was delivered to the compress company in the manner and at the time it was so delivered with the full knowledge and consent of the then holders of the bills of lading.

We have been thus tedious, perhaps, because of the great stress of counsel upon these propositions, and because he seems to stake his case upon them.

Learned counsel says that the majority opinion does not intimate that there was a conflict of evidence in the case. There was no occasion for such an intimation. It finds the facts explicitly which shows the right of the bank to recover aside from the statute.

Justice McCullough in his dissenting opinion only attempts to point out one fact about which he says there was a conflict and that is whether or not S-O. was on the little book. It is evident that the learned justice had not given due consideration to the evidence. We have already pointed out that there could not be a particle of doubt as to this fact. The majority of the court so found and it is not the province of this court to question it. The principle ground of dissent of Justice McCulloch is as to the construction of the contract. After discussing the common law rule in reference to delivery he says: (Printed Trans. 107.) *"Now the statute in question does not alter this rule in any wise."*

In this connection we wish to refer briefly to the dissenting opinion of Justice McCullough as we did in our brief in the Supreme Court on motion to reconsider.

Again, learned counsel quotes from the dissenting opinion to the effect that we relied upon the statute, alone. In this, we submit that the learned Justice overlooked the fact that the burden of the testimony was taken at the trial upon the issue of delivery, aside from the statute. The testimony of both Hutchinson and Wright was exclusively upon the question of the conduct of the railroad company, and both show that not only were no directions or information given by the railroad company nor were any such in the possession of the compress company by which the cotton could be stored to the account of any one

other than Alphin & Lake Cotton Co., but that it was actually delivered to that company.

The learned Justice was in error as to the matter of pleading and probably was thus misled as to our position in the matter.

Under our system of practice all forms of action are abolished (Kirby's Digest, Sec. 5980), and it is provided that:

Sec. 6140. "No variance between the allegation in the pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits."

Sec. 6141. "When the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, and may order an immediate amendment without cost."

Sec. 6148. "The court must in every stage of an action, disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

The suit in this case was upon the bills of lading. The bank alleged the issuance of the bills, the agreement to convey and deliver, the indorsement of the bills, the demand for the cotton, a failure in delivery whereby plain-

tiff was damaged, and prays judgment for the amount of the damages.

The defendant in answer alleged a performance of the contract by delivery to the compress. The verdict was in conformity to the pleadings and proof. But if not, the proof was fully developed upon all phases of the case, and if it was sufficient to sustain a verdict under any form of pleading, no harm was done the railroad. "Under the reformed procedure, courts regard the substance rather than the form. * * * The character of the action must be determined by the nature of the grievance rather than the form of the declaration."

Fordyce v. Nix, 58 Ark. 139.

Railway Co. v. Triplett, 54 Ark. 304.

St. L., I. M. & S. Ry. v. Harper, 44 Ark. 527.

Railway Co. v. Hammond, 58 Ark 347.

Thompson v. Tucker, 5 Ark. 312.

Washington v. Love, 34 Ark. 93.

Nebraska Nat. Bk. v. Walch, 68 Ark. 433.

"Failure of a carrier to deliver goods on demand, after storage, without lawful excuse, is a breach of the original contract, for which suit may be brought on the contract."

Wilson v. Cal. Cent. R. Co. 29 Pac. 861.

Colgate v. Penn. R. R. 102 N. Y. 120.

Learned counsel refers to the acts of the bank in advancing over $37,000.00 upon these bills of lading. He overlooks the testimony of Oscar Davis, the cashier of the bank, who says that when Lake applied for the advances, he complained of the great delays in procuring cars with which to move cotton. (Printed Trans. 26.) That he said:

Q. "Mr. Davis, was there any reason why you should make demand for this cotton before you did?"

(Objected to by the defense because it is immaterial and objection overruled by the court and defense excepts.)

A. "There was no occasion for making any demand that we knew of."

He was then asked, "Was it anything unusual for banks to hold bills of lading that long without making demand?" Also about the custom of banks as to shipper's order bills of lading, but upon objection of counsel for the railroad it was overruled (Printed Trans. 35, 36.)

If permitted to answer it could readily have been shown that it is a well known fact that railroads frequently issue bills of lading before the property is loaded, and after being loaded there are not always engines with which to haul the cotton.

It is also a well known fact that the products and commerce of the country ~~is~~ are handled and disposed of through the medium of bills of lading. The cotton is

practically all paid for by the banks. A cotton dealer buys, say, 100 bales of cotton at Morrilton or other interior town, and takes a bill of lading from the railroad company and draws a draft with a bill of lading attached upon some bank in Little Rock for the price of the cotton. The bank pays the draft and retains the bill of lading as security for the money. It relies upon the railroad company to take care of the cotton. Often it happens that on account of the scarcity of cars, as we have seen, or from other cause the cotton is not delivered at Little Rock for weeks, and sometimes months, after the bill of lading is issued. When the cotton arrives at Little Rock the railroad delivers it to one of the compress companies with instructions not to deliver it without taking up the bills of lading. We respectfully submit that Justice McCulloch was not correctly informed on this point as per the excerpt from his opinion referred to by counsel.

Again, the bank had the right to rely upon the very clause of the contract on which learned counsel relies. (Printed Trans. 30). That will not bear the construction placed upon it by learned counsel. It provides merely in the first place that "the liability of the company as a common carrier thereunder terminates on the arrival of the cotton at the station or depot of delivery, and that the company will be liable only as warehouseman thereafter; and unless removed by the consignee within twenty-four hours after its arrival the cotton may be removed and stored by the company at owner's risk and expense in *the warehouse*

of the company or one of its selection. Now it is well settled that *owner's risk* does not mean carrier's or warehouseman's negligence. Suppose this cotton had been delivered to a *warehouse owned by the company*, could it be said that the company was discharged from all further liability?

In *New Jersey Steam Nav. Co. v. Merchants Bk.* 6 How. 344, 12 L. E. 465, the bill of lading provided that the property should be "at all times exclusively at the risk of owner." Held, that this would not relieve the carrier from ordinary care.

This rule was approved in an able opinion in *N. Y. C. R. R. v. Lockwood*, 17 Wall. 357, 21 L. E. 627.

It was followed in *The Suny*, 26 Fed. 791, where it was held that a stipulation placing the property at the risk of the owner, did not relieve the carrier from its own negligence.

Hart v. Penn. R. R. Co. 112 U. S. 338, 28 L. E. 720.

Liverpool & G. U. S. Co. v. Phoenix Ins. Co. 129 U. S. 438, 32 L. E. 791.

But the contract also provides that "after remaining in such warehouse sixty days, *the carrier* at point of destination may, at its election, advertise in one or more newspapers published in that

county for not less than ten days and sell the cotton either at that point or at such point *on its line as it may select,* and out of the proceeds of *such sale pay all charges."* Now this, we submit, clearly evinces the purpose on the part of the railroad to retain control over the cotton whether stored in its own warehouse or in one of its own selection.

Hutchingson on Carriers, Sec. 488.

Wright & Cotton v. Warner, 58 N. E. 1082.

III.

The court has not denied the right of the railroad company in this case to contract. It has only construed the contract, as made by the parties. This is clearly apparent from the opinion of the Court, which says (Printed Trans. 106):

"Appellant failed to deliver the cotton on the surrender and cancellation of the bills of lading issued therefor, and under the statute of this State is liable to the appellee for damages. But appellant insists that, according to the bills of lading, it was to transport the cotton to El Dorado and deliver it to the care of the compress company, and that when it did so it discharged its whole duty, and was thereby relieved of further responsibility. If this contention be correct, the stipulation in the bills of lading by which appellant undertook to deliver the cotton to the order of the shipper was meaningless. According to the stipulation, it could not have delivered the cotton except upon the pro-

duction of the bills of lading properly indorsed; for this was notice to the carrier that the shipper intended to retain in his power the ultimate disposition of the goods (cotton). The failure of the legal holder of the bills of lading to appear for the purpose of receiving the cotton when it reached its destination did not relieve appellant of further responsibility. But under the contract and the law it had the right to store the cotton with the compress company with authority and directions to deliver it to the person entitled to it upon the production of the bills of lading properly indorsed. Under the contract as shown by the bills of lading, it was relieved of liability on account of the storage but not of the failure to deliver according to law. See *Midland National Bank v. Mo. Pac. R. Co.* (Mo.) 33 S. W. 521, 525."

Neither a finding of fact nor a construction put upon the cotnract or upon the statute in the Supreme Court of Arkansas will be interfered with in this Court. In addition to the authorities cited in our brief on the motion to dismiss, we cite:

M. K. & T. Rwy. Co. v. McCann, 174 U. S. 580, L. E. 43, 1093.

Penn. R. R. v. Hughes, 191 U. S. 477-48, L. E. 268.

West. Union Tel. Co. v. Call Pub. Co. 181 U. S. 92, 45 L. E. 765.

Allen v. Alleghany Co. 196 U. S. 458, 49 L. E. 551.

Gatewood v. State of North Carolina, recently decided by this court. 203 U. S. 531

Nor does it matter whether or not the compress company was a link in the transportation of the cotton. The court in neither event has denied the right of the railroad company to store the cotton. When learned counsel insists upon this proposition he is inconsistent with the contention that delivery to the compress company discharged the carrier from further liability. But the case of *Atlanta Nat. Bk. v. Southern Ry. Co.* 106 Fed. 623, referred to by counsel on this point, is an authority for the bank rather than for the railroad company. In that case the cotton was billed to *pass through* the compress on the way to its final destination. It was delivered to the compress company accompanied by manifests which expressly placed the cotton in their care with specific directions that it was to be delivered to order, etc.

IV.

Learned counsel has out of his large experience and extensive learning upon questions pertaining to interstate commerce, given to the court much information upon the subject in his very able brief, that will be of interest and value. But the principles applicable to this case, we submit, have been so well settled by this court that it is

unnecessary that we should undertake to follow counsel in his refinements as to the law.

As to the powers of Congress under the interstate commerce clause of the Constitution, but little difficulty has been experienced by the courts, until, perhaps, the enactment of the recent fellow-servants act by Congress. The greatest difficulty has arisen in defining accurately the powers of the States, in matters touching or relating to interstate commerce. This power at first treated as the Police Power was thought only to refer to the power to protect the health and morals of the State. But now it is definitely settled by this court that it "embraces regulations designed to promote the public convenience or the general prosperity as well as regulations designed to promote the public health the public morals, or the public safety."

> *C. B. & Q. R. Co. v. Illinois ex rel. Grimwood,* 200 U. S. 592-50 L. E. 609 and authorities cited.
>
> *Lake Shore & M. S. R. Co. v. Ohio ex rel. Lawrence,* 173 U. S. 297-8-10.

In his endeavor to invoke this clause of the Constitution as a protection against the statute of Arkansas, learned counsel has been compelled to place an unwarranted interpretation not only upon the facts of the case and the opinion of the Supreme Court of Arkansas as we have endeavored to show but upon the statute itself. He says

that the clause of the statute "forbidding delivery of goods except upon surrender of the bill of lading, * * * is applied by the court to the act of a railway company in placing in a warehouse selected by the shipper at destination an unclaimed shipment of interstate freight, in accordance with a stipulation in the bill of lading expressly authorizing it."

As to this we submit that we have demonstrated that the court decided, and it could not have decided anything else under the facts in the case—that the railroad company had not delivered the cotton to the compress in accordance with the requirements of the bill of lading, and the principles of law applicable to the contract, and therefore the statute was applicable. Whatever may be decided as to the statute when applied to such cases as come within the range of the imagination of learned counsel, the Supreme Court of Arkansas has not given to this statute, either the interpretation or application indicated by counsel, and this court will not give to the facts or statute an interpretation or application other than that given to it by the Supreme Court of Arkansas.

McCain v. Des Moines, 174 U. S .168, 43 L. E. 936.

M. K. & T. R. Co. v. McCain, 174 U. S. 580, 43 L. E. 1093.

Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92, and authorities cited in our motion to dismiss.

Learned counsel next contends that the statute attempts to deal with that feature of interstate commerce which in its nature is national and admits of only one system or plan of regulation, and therefor is within the exclusive power of Congress.

We submit that there is no more necessity for uniformity in reference to the delivery of property as between the carrier and the consignee, than in case of pilots, nor is it more national in its nature. Why not require all pilots to be licensed by the same authority? Why allow a State alone to say what pilots shall conduct steamers bearing interstate traffic, within its borders? Why not have uniform quarantine and inspection laws? The common experience of the nation, now demands it. Why not have uniform regulations for licensing engineers? Why not have uniform regulations as to color blindness? Why should the carrier be required to change engineers at each State border on account of the want of uniformity in this regard? Why not have uniform laws regulating the heating of cars? Why require the interstate carrier to discard cars at the border of every State simply because a car heated in a different manner is required by the laws of that State. Why not have uniform laws regulating the watering, feeding, and resting of cattle, etc.? Why not

have uniform laws regulating the runing through trains carrying passengers or freight from New York to Chicago, and designating the places and manner at which stops shall be made and passengers received and discharged?

Learned counsel referring to the case of *Houston & Tex. Cent. R. Co. v. Mayes*, 201 U. S. 321, where this court held invalid the statute which required the carrier to furnish on demand of the shipper a certain number of cars upon a specific day, regardless of other considerations, said: "In this case therefore, the court has held that the matter of furnishing cars for interstate business is a matter in respect of which interstate commerce should be free and 'unobstructed' by burdensome State regulations—in other words, it is a subject national in character, requiring uniformtiy of regulation."

Now we submit that learned counsel is mistaken as to the effect of this decision. The court did not hold the statute invalid because it applied to "a subject national in character requiring uniformity of regulation," but because the statute required the cars to be furnished "regardless of every other consideration except strikes and other public calamities." It made no exception in cases of sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other States, or in other places within the State. It makes no allowance for interference by wrecks or other accidents on the same or other roads, involving a deten-

tion of traffic, the burning of bridges, accidental fires, washouts, or other unavoidable consequences of heavy weather; and was therefore an undue burden upon commerce. The court said: "Although it may be admitted that the statute *is not far from the line of proper police regulation*, we think that sufficient allowance is not made for the practical difficulties in the administration of the law and that as applied to interstate commerce it transcends the legitimate powers of the legislature."

The mistake of counsel illustrates the fallacy of his argument as to the national features of legislation. It will be found that the test applied to statutes like the one under consideration is merely as to whether or not they unduly burden commerce.

The authorities cited by learned counsel do not sustain him:

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, was simply a State tax upon the stock of Ferry Co. which only discharged and received passengers to and from New Jersey. And was held not within the power of the State.

The decision is placed upon the ground that:

"The commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject national in character and requires uniformity of regulation." This we submit will be found to be the character of all cases which the

courts held to be *national* in character. They all refer to some matter of public duty and policy and which are not of a private nature.

Hall v. De Cuir, 95 U. S. 485, attempted to regulate the conduct of the carrier and influence his conduct *throughout the entire voyage* as to the kind of accommodations provided for passengers of color.

Wabash, etc., R. Co. v. Illinois, 118 U. S. 557, was an effort to apply a long and short haul statute to two interstate rates. It was an interference *with the continuous passage of interstate shipments* and therefore void.

In *Central Stock Yards Co. v. Louisville & N. R. Co.* 118 Fed. 113, the effort to require one company to deliver stock at the yards of another and situated upon the line of another railroad company was held ineffectual. These were purely duties required as to the public and beyond any contract of the carrier.

There is nothing whatever in the statutes of Arkansas which undertakes or has the effect to interfere with the free through shipment of interstate traffic. There is no effort to tax or interfere with the free intercourse between the States. As said by the court in *Chicago & C. R. Co. v. Solan*, 169 U. S. 133:

"A statute is in no just sense a regulation of commerce which does not undertake to impose any tax upon the company, or to restrict the persons or things to be carried,

or to regulate the rate of tolls, fares, or freight. A State may enact a statute the object and effect of which are to make it more sure that railroad companies shall perform the duty resting upon them by virtue of their employment as public carriers, to use the utmost care and diligence in the transportation of passengers and goods."

This states the rule applicable to this case clearly and tersely. The courts uniformly hold the carrier to the strictest performance of its duties in making delivery to the proper party as well as in transporting. Learned counsel, while evidently in a gloomy mood, imagines what might happen if the laws of Louisiana were different from the laws in Arkansas. We submit that it is enough for us to reply that the laws of Louisiana are the same as the laws of Arkansas, as to bills of lading."

Acts of La. 1876, p. 113, No. 72.

Voorheis' Rev. Laws of La., 2d Ed. Secs. 2477-2488.

Rev. Stat. La., 1870, pp. 585-92 Sec. 2477-88

Porter on Bills of Lading, Sec. 89.

Holton v. Hubbard, 49 La. Ann. 705.

Bank v. Meyer, 43 La. Ann. 1.

But whether different or not the contract would be interpreted according to the general principles of law.

Curtis v. Railroad, 74 N. Y. 116.

This same argument was urged by the carrier in *N. Y. N. H. & H. R. R. Co. v. State of New York*, 165 U. S. 632.

But the court said: "Counsel for the railroad suggests that a conflict between State regulations in respect of the heating of passenger cars used in interstate commerce would make safe and rapid transportation impossible; that to stop an express train on its way from New York to Boston at the Connecticut line in order that passengers may leave the cars heated as required by New York, and get into other cars heated in a different mode in conformity with the laws of Connecticut, and then at the Massachusetts line to get into cars heated by still another mode as required by the laws of that commonwealth, would be a hardship on travel that could not be endured. These possible inconveniences cannot affect the question of power in each State to make such reasonable regulations for the safety of passengers on interstate trains as in its judgment, all things considered, is appropriate and effective. Inconveniences of this character cannot be avoided so long as each State has plenary authority within its territorial limits to provide for the safety of its public, according to its own views of necessity and public policy, and so long as Congress deems it wise not to establish regulations on the subject that would displace any inconsistent regulations of the States covering the same ground."

Lake Shore & M. R. Co. v. Ohio & St. Lawrence,
173 U. S. 285.

Again counsel says the statute is not of that class which has been upheld by this court as merely expressive of the common law liability of carriers. We respectfully submit that no duty of the carrier is more strictly enforced at comomn law than that of delivery. Nothing could be calculated more effectually to secure the correct performance of this duty and to protect the right of the holder than to require the carrier to take up the bill of lading on delivery of the property. If as said by the supreme court of Arkansas the purpose was to secure the performance of the duties which the carrier owes to the holder of the bill of lading there can be no burden imposed upon the carrier. It cannot complain because required to perform its duty. It will be noted that the statute does not forbid the carrier to store the cotton at the owner's risk. But if the carrier exercises the privilege of storing the property the storage must be a proper one. The proper storage is not made by dumping the property into a warehouse without proper directions or data by which it may be identified, and delivery be made to the holder of the bill of lading.

The duty of making proper delivery is far more important than that of keeping rates posted, as required in *Railroad Company v. Fuller*, 17 Wallace 560. There is no common law duty requiring the posting of rates. But this court decided in that case that, "It is not in the sense

of the Constitution in any wise a regulation of commerce. It is a police regulation and as such forms a portion of the immense mass of legislation which embraces everything within the territory of a State not surrendered to the General Government, all of which can be most advantageously exercised by the States themselves."

The statutes of Arkansas in requiring delivery upon surrender of the bills of lading did not undertake to add to the common law liability of the carrier, to the extent undertaken by the Indiana Statute which made the carrier liable in tort resulting in death, and which was held in *Shuloch v. Alling*, 93 U. S. 99, not to be a regulation of interstate commerce, but merely fixed a rule of civil liability. The statutes of Arkansas relate purely to "rights, duties and liabilities of citizens, and only indirectly and remotely, if at all, affect the operations of commerce, and as said, in the above case, is of obligatory force upon citizens within its territorial jurisdiction, foreign or interstate, or in any pursuit." Why should not the State be authorized to pass enactments for the protection of the rights of its citizens, in reference to contracts between the carrier and shipper, as well as between private parties?

The Missouri statute providing in substance that whenever a common carrier receives property to be transferred from one place to another, within or without the State, or when a railroad or other transportation company issues receipts or bills of lading for such property, such company

shall be liable for any loss of or injury to such property resulting from its own negligence or from the negligence of another carrier to whom the goods are delivered or over whose lines they pass, and that any carrier receipting for such goods shall be entitled to recover in a proper action, the amount of any loss or damage which it may be compelled to pay to the owner of such property for the company on whose line the loss has occurred, has been held constitutional in the following decisions:

Dimmitt v. St. Louis City, etc., R. Co., 103 Mo. 433.

Nines v. St. Louis, etc., R. Co. 107 Mo. 475.

Marshall, etc., Grain Co. v. Kansas City, etc., R. Co. 176 Mo. 480.

Western Sash Co. v. Chicago, etc., R. Co. 177 Mo. 641.

McCann v. Eddy, 133 Mo. 59.

The doctrine of these cases was affirmed in *M. K. & T. Ry. Co. v. McCann*, 174 U. S. 580, 43 L. E. 1093. It was held that the interpretation put upon a statute by the supreme court of the State was binding in the supreme court of the United States, and that a statute of Missouri making a railroad company issuing bills of lading for transportation of property liable for damages to the property caused by the negligence of another railroad company over whose lines the property passes does not entail the power

of the company to contract in unambiguous terms put into the portion of its agreement reciting the contract to carry, and such statute is not, as affecting interstate transportation, repugnant to the Federal Constitution. The court held that the statute merely prescribed the form of the contract.

It will be noted also that the railroad company in this case was incorporated under the laws of Arkansas (Printed Trans. 10.) The statute in this case is being applied to a domestic corporation owing duties to the State and subject to its laws. The railroad company "accepted its charter subject to the condition that it would conform to such reasonable State regulations as were for the public interests and not in violation of the supreme laws of the land," as held and emphasized by this court in *Lake Shore & M. S. Ray Co. v. Ohio & St. Lawrence*, 173 U. S. 285, 43 L. E. 297, where the court in upholding a statute requiring interstate trains to stop at towns in Ohio containing 3,000 inhabitants, reviewing the authorities as to the powers of the States and said:

"Now, it is evident that these cases had no reference to the health, morals or safety of the people of the State, but only to the public convenience. They recognize the fundamental principle that, outside of the field directly occupied by the general government under the powers granted to it by the Constitution, all questions arising within a State that relate to the internal order, or that involve the

public convenience or the general good, or primarily for the determination of the State, and that its legislative enactments, relating to those subjects and which are not inconsistent with the State Constitution, are to be respected and enforced in the courts of the Union if they do not by their operation directly entrench upon the authority of the United States or violate some right protected by the National Constitution. The power here referred to is, to use the words of Chief Justice Shaw, the powers to 'make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonweath and of the subjects of the same.' *Com. vs. Alger*, 7 Cush. 53, 85. Mr. Cooley well said, 'It cannot be doubted that there is ample power in the legislative department of the State to adopt all necessary legislation for the purpose of enforcing the obligations of railway companies as carriers of persons and goods to accommodate the public impartially, and to make every reasonable provision for carrying with safety and expedition.'

Cooley's Const. Lim. (6th Ed.) p. 715.

"It may be that such legislation is not within the 'police power' of a State, as those words have been sometimes, although inaccurately used. But in our opinion the power, whether called police, governmental, or legislative, exists in each State, by appropriate enactment not forbid-

den by its own Constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good. This power in the States is entirely distinct from any power granted to the general government, although when exercised it may sometimes reach subjects over which national legislation can be constitutionally extended. When Congress acts with reference to a matter confided to it by the Constitution, then its statutes displace all conflicting local regulations touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the States to the general government. *Gibbons vs. Ogden*, 9 Wheat. 1, 210 (6: 23, 73). *Sinnot vs. Davenport*, 22 How. 227, 243 (16, 243, 247). *Missouri, Kansas & Texas Railway Co. vs. Haber*, 169 U. S. 613, 626 (42: 878, 883.)

"It is not contended that the statute in question is repugnant to the Constitution of the United States when applied to railroad trains carrying passengers between points within the State of Ohio. But the contention is that to require railroad companies, even those organized under the laws of Ohio, to stop their trains, or any of them carrying interstate passengers, at a particular place or places in the State for a reasonable time, so directly affects commerce among the States as to bring the statute, whether Congress has acted or not on the same subject, into con-

flict with the grant in the Constitution of power to regulate such commerce. That such a regulation may be in itself reasonable and may promote the public convenience or subserve the general welfare is, according to the argument made before us, of no consequences whatever; for, it is said, a State regulation which *to any extent* or for a limited time only interrupts the absolute, continuous freedom of interstate commerce is forbidden by the Constitution, although Congress has not legislated upon the particular subject covered by the State enactment. If these broad propositions are approved, it will be difficult to sustain the numerous judgments of this court upholding local regulations which in some degree or only incidentally affected commerce among the States, but which were adjudged not to be in themselves regulations of interstate commerce, but within the police powers of the States and to be respected so long as Congress did not itself cover the subject by legislation."

In *Pierce v. Van Dusen*, 78 Fed. 693, the Court of Appeals for the Sixth Circuit, Justice Harland rendering the opinion—sustained a statute of Ohio, holding railroads liable for injuries occasioned by negligence of fellow-servants, as applied to roads engaged in interstate commerce.

The case of *Western Union Tel. Co. v. James*, 162 U. S. 650, we submit is not distinguishable from the one at bar. There the Telegraph Company was required to make correct delivery. That is all that is required of the railroad com-

pany in this case. There is nothing in the statute which prevents storage of the goods as at common law. The requirement that the bill of lading shall be taken up at the time of delivery is nothing more than was required at common law, especially as to shipper's order bills of lading. If it were not so at common law the requirement of the statute as we shall show is clearly within the powers of the State. Besides at least the statute, in one sense of the word, simply prescribes the form of the bill of lading. Any carrier that deems the requirements of the statute to be burdensome or undersirable can readily avoid them by writing "not negotiable" across the face of the bill. This is not by any means so burdensome as the Virginia Statute which required the contract of exemption to be in writing and signed by the owner, or his agent, and which was upheld by this court in *Richmond & Alleghany, R. Co. v. Potterson Tobacco Co.*, 169 U. S. 311.

The argument of counsel as to the difficulty of procuring bills of lading from distant countries, with "not negotiable" written on them, was met by this court in the language quoted above from *N. Y. N. H. & H. R. R. v. State of New York*, 165 U. S., 652-3. But the difficulty is purely imaginary. All carriers are supposed to contract with reference to the laws of the place where the contract is to be accomplished. All understand the difference between negotiable and non-negotiable instruments. There could be no more difficulty as to the form of bills of lading

of this kind than there would be as to the kind of cars required by the statute of New York.

There can be no difference whether the statute is applied to a shipment originating in the State or out of the State. The same rule was applied in *Pennsylvania R. Co. v. Hughes,* 191 U. S. 477, when the terms of the bill of lading issued in New York for through transportation of a horse to Pennsylvania, limiting the liability of the carrier, were held void as against the statutes of Pennsylvania, although made in New York and valid in New York. The court in an able opinion reviews the authorities on this point and quotes approvingly from *Chicago, M. St. P. R. Co. v. Solan,* 169 U. S. 133, as the Supreme Court of Arkansas quoted as follows:

"Railroad corporations like all other corporations and persons doing business within the territorial jurisdiction of a State, are subject to its law. It is in the law of the State that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the measures by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons traveling on interstate trains are as much entitled, while within a State, to the protection of that State, as those who travel on domestic trains. A carrier exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable according to the law of the State for acts of nonfeasance or mis-

feasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, the right of action for the consequent damage is given by the local law. It is equally within the power of a State to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which after they have been inflicted the State has the power to redress and punish. The rules prescribed for the construction of railroads and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not in themselves regulations of interstate commerce, although they control in some degree the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State, to regulate the relative rights and duties of all persons and corporations within its limits."

In *Kavanaugh & Co. v. So. Ry. Co.*, 120 Ga. 62. Held that a statute providing that railroad receiving interstate freight from connecting carrier and receiving same in *"apparent good order"* should be liable for the damages, notwithstanding the injury may have been done, before re-

ceipt of goods—the difference to be settled between the carriers themselves.

The case of *Western Union Telegraph Co. v. Pendleton*, 122 U. S. 347, is clearly distinguishable. In that case the statute undertook to say what should be done in other States in reference to contracts to be accomplished in those States. It undertook to prescribe duties in reference to the citizens of such States and which as the court said might not be desired by such State. Here the act prescribed by the Arkansas statute relates exclusively to matters to be performed in Arkansas, and for the benefit of those doing business in Arkansas with reference thereto.

It is said by counsel that the effect of the statute is to place an actual burden upon the carrier with respect to any interstate shipment it transports. We have already answered the argument of counsel and referred to his authorities, in a former part of our brief. We might content ourselves at this point by simply referring to the fact, that the statute of Arkansas has been in force since 1887,—and this is the first time its validity has been called in question. It could not have been regarded by the carriers as burdensome, or some objection would have been raised to it before this.

In *Nebraska Mills v. St. S. W. R. C.*, 64 Ark. 169, the court sustained a delivery according to the contract on a straight bill of lading.

Dunn v. Hury, 44 Ark. 301.

Many other States have practically the same statutes as will be seen from the appendix to Porter on bills of lading. The Missouri statute of which the Arkansas statute seems to be an exact copy has been under consideration by this court in the cases of *Shaw v. Bank*, 101 U. S. 557 and *Allen v. Bank*, 120 U. S. 20. The Supreme Courts of the different States have passed upon the various statutes of those States, but never so far as we have been able to discover has the suggestion been made that any of those statutes are burdensome or in conflict with the Constitution or laws of the United States. Here we have a practical test of the utility and fairness of the statutes, which speaks far more forcibly than anything that may be imagined against them by counsel.

We respectfully submit that the statute is entitled to broader and much more liberal interpretation than that given by the Arkansas Supreme Court without coming into conflict with the commerce clause of the United States. The important place which bills of lading have assumed in the business affairs of the country is well known to all. Almost the entire produce of the country is now handled and paid for through the banks, by means of bills of lading as security. The banks nor others would use them if doubt were cast upon their validity or stability or negotiability. Hence this class of statutes is aimed as we think, not only to secure a strict performance of the duties of the carrier, but also to the prevention of the use of bills of lading, which have been issued without the property being on hand, or

that may have been left outstanding after the delivery of the property. The statute makes them negotiable, that power is not questioned, why should it not also protect the holder? It is said that they are not transferable except during transit. That may have been the English law. It is not so here. See *Midland Nat. Bk. v. Mo. Pac. R. Co.*, 33 S. W. 521-5; *First Nt. Bk. v. Cohn*, 111 Mass. 163. Besides the statute covers any question of that kind. The statute of New York at an early date was substantially the same as the one now under consideration.

In *Colgate v. Pennsylvania R. R. Co.*, 102 N. Y. 120, oil was shipped from Arkansas and Tennessee, consigned to O'Shaughnessy in New York. The bills of lading were transferred to the plaintiff for moneys advanced to the consignee. Before notice was given to the defendant of the transfer of the bills, or any demand made for the oil, it was, under the authority and direction of the consignee, delivered to another. The plaintiffs afterward demanded the oil from defendant upon their bills of lading, but no delivery could be made. The court said:

"Whether before the statute (2 R. S., 6th Ed., 230) the difference in the bills of lading between those drawn 'to order' and those 'billed straight' to the consignee alone created a difference in the duty and right of the carrier in respect to delivery, we do not consider it important to consider, since we agree with the courts below as to the decisive effect of the statute upon the facts in controversy.

The defendant transported the oil under bills of lading which constituted the contract between shipper and carrier, and served also as evidence of title, the transfer of which would transfer the property. That would follow, even no words of negotiability were contained in the instrument, and its transfer, with an intention to pass the title, would give the holder an ownership of the property. By that process the plaintiffs became the owners of the oil, and on showing that fact, by producing the bills of lading, which were indorsed over to them by the consignee, they had a right to call upon the carrier for the property. The latter defends by showing a delivery to the consignee in ignorance of the plaintiffs' right, but without the production and cancellation of the bills of lading. Such delivery was in accordance with the written words of the contract, but not according to its terms, as modified by the express command of the statute. That forbids a delivery except upon the production and cancellation of the bills of lading, and interpolates into every such instrument that imperative condition, and makes such condition an element of the contract, as perfectly as if therein written. It gives to the bills of lading under which the oil was carried, this construction: that the carrier should deliver to the consignee, provided he produced and cancelled the bills of lading. The primary object of the statute was to insure delivery to the party actually entitled, and closes the door upon opportunities for fraud resulting from ignorance of the true ownership. The carrier delivered to the consignee in disregard of the statu-

tory prohibition, and that can not be a good delivery which the law expressly forbids. Obedience to the statute would have prevented the injury which happened. The consignee had parted with the bills of lading and his consequent right to the property, and the delivery to him was to one not the owner and having no right to receive it. There is no hardship in the rule. If the carrier does not desire to obey its requirements he may stamp his bills of lading with the words, 'not negotiable?' In that shape they warn the purchaser that the carrier will deliver to the consignee and not be bound by a transfer of the bills. But if he issues them without that warning, he is bound to know that they may be passed into other hands and become the property of others than the consignee, and that his duty and his contract is to deliver to him who produces and cancels the evidence of title."

Midland Nat. Bank v. Mo. Pac. Ry. Co., 33 S. W. 521.

National Bank v. Railway Co., 25 S. C. 223, 224.

The terms of this statute are not so drastic as the statutes of Arkansas which makes all notes taken for a patent right non-negotiable and requires the vendor to have plainly written upon them "given for patent right," and if not, declaring such notes to be absolutely void. That statute was attacked as in conflict with that clause of the Constitution which gives to Congress the right to legislate and control, as to patent rights. But the statute was up-

held by this court in the case of *Woods v. Sons*, recently decided by this court. 203 U. S. 358.

V.

The contention of counsel that the statute is in conflict with the interstate commerce act, approved February 4, 1887, we submit, is clearly untenable. The proviso in the first section of the act, it seems to us is clearly against the contention of counsel. It reads: "Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property; or to the receiving, delivering, storage, or handling of property, *wholly within one State, and not shipped to or from a foreign country* from or to any State or territory as aforesaid." This would seem to settle the contention in favor of the bank. In the case of *Pennsylvania R. Co. v. Hughes*, 191 U. S. 486-7, the counsel for the railroad company took a different view of this section of the law from that taken by learned counsel in this case. The counsel for the railroad company filed an assignment of error as follows:

"III. The learned court below erred in entering judgment in conflict with the act of Congress of February 4, 1887, entitled an act to regulate commerce. Section 1 of said act clearly provides that when the transportation is from one State to another, under a through bill of lading its provisions shall be carried out, unless it be in conflict with a statute of the State in which it may be performed, or in conflict with the policy of the United States as laid down

in the Federal Courts, and that, as the contract was valid in the place where made, and, as there is no statute in Pennsylvania prohibitory of an agreed valuation to establish a rate, and as it is consistent with the policy of the United States as declared by the Federal Courts, the judgment should have been for the valuation mentioned in the contract."

This court referring to this assignment said: "It may be assumed that under the broad power conferred upon Congress over interstate commerce as defined in repeated decisions of this court, it would be lawful for that body to make provision as to contracts for interstate carriage, permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation. But upon examination of the terms of the law relied upon we fail to find any such provision therein. The sections of the interstate commerce law relied upon by learned counsel for plaintiff in error, (24 Stat. at L. 379-82, Chap. 104 U. S. Comp. Stat. 1901, pp. 3154-3159; 25 Stat. at L. 855, Chap. 382, U. S. Comp. Stat. 1901, p. 3158), provide for equal facilities to shippers for the interchange of traffic; for non-discrimination in freight rates; for keeping schedules of rates open to public inspection; for posting the same in public places, with certain praticulars as to charges, rules and regulations; for the publication of joint traffic rates for continuous transportation over one or more lines, to be made public whe ndirected by the interstate commerce commission; against advances in tariff

rates except upon ten days notice to the commission; against reduction of tariff rates except after three days like notice; making it unlawful for any party to a joint tariff to receive or demand a greater or less compensation for transportation of property between points as to which a joint tariff is made different than is specified in the schedule filed with the commission; giving remedies for the enforcement of the foregoing provisions, and providing penalties for their violations; making it unlawful to prevent continuous carriage and providing that no break of bulk, stoppage or interruption by the carrier, unless made in good faith for some necessary purpose, without intention to evade the act, shall prevent the carriage of freights from being treated as one continuous carriage from place of shipment to the place of destinations."

This clearly excludes any idea of regulations as to the delivery of freights to individuals, or the performance of contract with individuals in reference thereto. Nor does the third paragraph quoted by counsel have any such reference. It only has reference to charges made in a general way for receiving, delivering, storage or handling. It is an effort to protect the public against illegal exactions. Not a regulation of his duties in making delivery to the proper individual.

There is nothing in any of the authorities to which counsel has referred which conveys a different idea than that expressed by the court, as quoted above, or to indicate

that the interstate commerce enactment was intended in any way to regulate acts prohibited by the statute of Arkansas, or involved in this case. This is evidently an afterthought of counsel. No such contention was made in the courts below. No such is made in the assignments of errors.

JOHN FLETCHER,

For Defendant in Error.

W. C. RATCLIFFE,

MOORE, SMITH & MOORE,

SMEAD & POWELL,

Of Counsel.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

56.

IN THE

Supreme Court of the United States

THE ARKANSAS SOUTHERN RAILROAD COMPANY AND GEORGE C. GRIFFITH
.....*Plaintiffs in Error*

v. No. [redacted]

THE GERMAN NATIONAL BANK, *Defendant in Error*

BRIEF FOR GERMAN NATIONAL BANK ON MOTION TO DISMISS.

JOHN FLETCHER,
for Defendant in Error.

DEMOCRAT PRINTING & LITHOGRAPHING CO.

IN THE

Supreme Court of the United States

THE ARKANSAS SOUTHERN RAILROAD COMPANY AND GEORGE C. GRIFFITH .....*Plaintiffs in Error*

v. No. 326.

THE GERMAN NATIONAL BANK, *Defendant in Error*

BRIEF FOR GERMAN NATIONAL BANK ON MOTION TO DISMISS.

The motion to dismiss the writ of error in this case is as follows:

IN THE SUPREME COURT OF THE UNITED STATES.

THE ARKANSAS SOUTHERN RAILROAD COMPANY *and* GEORGE C. GRIFFITH.....*Plaintiffs in Error*

v. No. 326.

THE GERMAN NATIONAL BANK.....*Defendant in Error*

The German National Bank, defendant in error, moves the Court to dismiss the writ of error herein, because the assignments of error among others herein are as follows:

"5. The Supreme Court of Arkansas erred in not holding and deciding that the defendant railroad company had complied with its contract by delivering to the compress the cotton described in each bill of lading representing cotton shipped from Louisiana to Arkansas.

"6. The Supreme Court of Arkansas erred in holding and deciding that the defendant railroad company did not comply with its contract by delivering to the Compress Company the cotton described in each bill of lading sued upon herein representing cotton shipped from Louisiana to Arkansas.

"7. The Supreme Court of Arkansas erred in finding, holding, and deciding that the cotton described in the bills of lading representing cotton shipped from Louisiana to Arkansas sued upon herein was 'delivered to the Compress Company for account of Alphin & Lake Cotton Company.'

"8. The Supreme Court of Arkansas erred in finding, holding and deciding as to shipments from Louisiana to Arkansas that, 'in delivering cotton to the Compress Company, no other directions were given to it than that contained in this little book. Nothing was said about it in any other way. It was just delivered by that little book, and that was all that passed between the parties. It was always supposed to belong to Alphin & Lake Cotton Company by the compress and railroad, and was unloaded at once. All the compress did was to count the cotton and O. K. the book as to the number of bales. Neither S. O., meaning shipper's

order, nor care of Compress Company was on this little book. S. O. appears to be on the book now, but was placed there after the cotton was delivered. It was not on the way-bill from which the book was made up. The cotton was treated as belonging to Alphin & Lake Cotton Company and was delivered without taking up the bill of lading.'

"9. The Supreme Court of Arkansas erred in affirming the action of the trial court in directing a verdict against the defendant Railroad Company upon each bill of lading sued upon.

"10. The Supreme Court of Arkansas erred in not reversing the judgment of the trial court.

"11. The Supreme Court of Arkansas erred in denying each ground of the petition for rehearing filed by the appellant.

"12. The Supreme Court of Arkansas erred in overruling and denying each of the grounds for a new trial contained in defendant's motion for a new trial filed in the Circuit Court of Union County, Arkansas, towit:

1. The verdict of the jury is contrary to law.

2. The verdict of the jury is contrary to the evidence.

3. The verdict of the jury is contrary to the law and evidence.

4. The court erred in refusing to give instruction No. 1 as asked by the defendant.

5. The Court erred in refusing to give instruction No. 2 as asked by the defendant.

6. The Court erred in refusing to give instruction No. 3 as asked by the defendant.

7. The Court erred in refusing to give instruction No. 4 as asked by the defendant.

8. The Court erred in refusing to give instruction No. 5 as asked by the defendant.

9. The Court erred in refusing to give instruction No. 6 as asked by the defendant.

10. The Court erred in refusing to give instruction No. 7 as asked by the defendant.

11. The Court erred in refusing to give instruction No. 8 as asked by the defendant.

12. The Court erred in refusing to give instruction No. 9 as asked by the defendant.

13. The Court erred in refusing to give instruction No. 10 as asked by the defendant.

14. The Court erred in refusing to give instruction No. 11 as asked by the defendant.

15. The Court erred in refusing to give instruction No. 12 as asked by defendant.

16. The Court erred in refusing to give instruction No. 13 as asked by defendant.

17. The Court erred in refusing to give instruction No. 14 as asked by defendant.

18. The Court erred in refusing to give instruction No. 15 as asked by defendant.

19. The Court erred in refusing to give instruction No. 16 as asked by defendant.

20. The Court erred in refusing to give instruction No. 17 as asked by defendant.

21. The Court erred in refusing to give instruction No. 18 as asked by defendant.

22. The Court erred in refusing to give instruction No. 19 as asked by defendant.

23. The Court erred in directing the jury to return a verdict for the plaintiff.

24. The Court ererd in refusing to allow witness Hutchinson to answer the following question: 'How long had the Arkansas Southern Railroad Company been delivering cotton in this way and storing it with or delivering it to the El Dorado Compress Company?'

25. Because the Court erred in refusing to permit the witness Hutchinson to answer the following question: 'Has it been the general usage of the defendant since the time the compress was built at El Dorado three years ago to store cotton at the compress for the benefit of the holder of the bill of lading?

26. Because the Court erred in refusing to permit the

defendant to prove that it had been the usual custom and usage at El Dorado for the past three years for the cotton shipped on the Arkansas Southern Railroad to Eldorado to be delivered to the compress for the benefit of holders of bills of lading and that the usage was well known at this place.

27. Because the Court erred in permitting plaintiff to present the proof as to the issuance of bills of lading by the Iron Mountain Railway Company.

"28. The Court erred in refusing to permit the witness, Hutchinson, to explain what he meant by his statements in a deposition that he supposed that all cotton coming in over defendant's road and going into the compress went to the account of Aiphin & Lake.

"29. Because the Court refused to permit the defendant to read the letter from Walker to Hutchinson set out in the deposition of C. T. Walker."

None of said assignments of error contain a Federal question. They are questions for the exclusive determination of the State tribunals—whose judgment thereon is not subject to review by this Court, and the decision of said questions or either of them is sufficient to dispose of and settle this case without regard to the question raised as to the validity of the statutes of Arkansas by the first, second, third and fourth assignments of error.

JOHN FLETCHER,

Attorney for Defendant in Error.

It is settled that this court will not review a state judgment, although a Federal question was decided adversely to the plaintiff in error, if another question, not Federal, was also raised and decided against him, the decision of which is sufficient to sustain the judgment. It must appear that the judgment could not have been rendered without deciding the Federal question.

Harris v. Morton, 171 U. S. 38, 43 L. E. 63.

Cook County v. Calumet, 138 U. S. 635, 34 L. E. 1110.

DeLaussure v. Garland, 127 U. S. 216, 32 L. E. 125.

Murdock v. Memphis, 20 Wall. 590, 22 L. E. 429.

Klinger v. Mo., 13 Wall. 257, 20 L. E. 635.

K. & P. R. Co. v. P. & K. R. R. Co., 14 Wall. 23, 20 L. E. 850.

Johnson v. Risk, 137 U. S. 307, 34 L. E. 686.

Wood v. Skinner, 139 U. S. 293, 35 L. E. 193.

Henderson & Bridge Co. v. City of Henderson, 141 U. S. 679, 35 L. E. 900.

Eustis v. Bolles, 150 U. S. 361, 37 L. E. 1111.

The action was commenced in the State Court by the Bank against the railroad company upon various bills of lading for the shipment of cotton, all but two of which

originated on the line of the railroad company in Lousiana and ended at El Dorado in the State of Arkansas.

These bills were all in the usual form, were issued to "Shippers Order," and each bill contained the following:

"Consigned to S. O.,

c/ ~~care~~ Compress,

El Dorado, Ark.

Notify, Alphin & Lake Cotton Co." (Printed Record, 30, 31.)

The complaint sets forth the bills of lading, their issue, etc., by the railroad company, their transfer to the Bank for value demand on the railroad company for the cotton, its failure to deliver and damages. (Record, 10.)

The answer admitted the execution of the bills of lading, but alleged, "that in and by the terms of said bill of lading the cotton was consigned to the care of the Compress Company at El Dorado, whereby the defendant undertook to deliver the said cotton to the said Compress Company as agent for the holder of the bill of lading in case such holder did not present the said bill and demand the delivery of the cotton from defendant at the time of its arrival at El Dorado." (Record, 13.)

That defendant in "compliance with its undertakings as set out in said bills of lading delivered the said several lots of cotton to the Compress Company, as agent for said several holders of the bills of lading." (Record, 17.)

It will be seen that the chief defense of the railroad company was delivery to the Compress Company, *"as agent for the holder of the bill of lading."*

Now this defense, even of good, is not sustained by proof of mere delivery to the Compress Company, as held by the Court in assignments of error Nos. 6 and 8. It must have been delivered with proper instructions to hold for account of the holders of the bills of lading.

North v. M. & M. Transfer Co., 15 N. E. 782.

Hutchingson v. Ladd, 16 Mich. 493.

Johnson v. N. Y. C. R. Co., 33 N. Y. 610.

Libby v. Ingeals, 124 Mass. 503.

Little Miami R. v. Washburn, 22 Ohio St. 324.

Joslyn v. Grand Trunk Ry., 51 Vt. 92.

Cleveland & C. Ry. Co. v. Potts & Co., 71 N. E. 685.

North Pac. R. R. Co. v. Com. Nat. Bk., 123 U. S. 723.

National Bank v. Railway Co., 25 S. C. 223, 224.

Nor is the defense sustained by proof that the cotton was delivered to the Compress Company for account of Alphin & Lake Cotton Company as held by the court in assignments of error Nos. 7 and 8.

Delivery to the Compress Company *for account of*

Alphin & Lake Cotton Company was the same as delivery *to Alphin & Lake Cotton Company* which alone was sufficient to defeat any defense of the railroad company if there had been no other question in the case.

North Penn. Railroad Co. v. Commercial Bank of Ohio, 123 U. S. 727.

The Thames, 14 Wall. 98.

Hutchingson on Carriers (2 Ed.), § § 129, 130.

Daniel on Negotiable Instruments, § § 1728, 1731.

The Titans, 124 Fed. 975.

Blumenthal v. Bainerd, 38 Vt. 402.

Walters v. Western & A. R. Co., 66 Fed. 866.

Midland National Bank v. Mo. Pac. Ry. Co., 33 S. W. 521.

Bank v. Bissell, 72 N. Y. 615.

Joslyn v. Grand Trunk Ry., 51 Vt. 92.

That the judgment of the court was based upon the finding that the cotton was delivered to the Compress Company for the account of Alphin & Lake Cotton Company and that this was the basic question underlying the judgment of the court is not only conclusively shown by the assignment of errors but is clearly set forth in the petition for rehearing in the Supreme Court which says: "That the judgment of the court affirming the decision of the Circuit Court of

Union County is based upon the finding of fact by the court, that the Arkansas Southern Ry. Co. delivered the Cotton in controversy to the El Dorado Compress Company for account of Alphin & Lake Cotton Company. * * * "It further says that the basic question underlying the judgment of the Court is whether the cotton in controversy was delivered to the Compress Company by the Railway Company to the account of Alphin & Lake Cotton Company or for storage, and it says that this question is one of fact, the correct answer to which depends upon many facts and circumstances in evidence as well as the direct testimony of witnesses." (Record 110,111.)

The determination of this question against the railroad company renders it unnecessary that the court shoud go into the question as to the validity of the statute of the State.

Indeed it may be said that the determination of any of the other non-federal questions raised in the case and set out in the assignment of errors is sufficient to settle the case without considering the effect of the statute.

This Court will not re-examine the evidence, and when the facts are found by the court below as in this case this Court is concluded by such finding.

Egan v. Hart, 165 U. S. 188, 41 L. E. 680.

Cornell University v. Fiske, 136 U. S. 152, 34 L. E. 427.

In *Hale v. Akers*, 132 U. S. 554, 33 L. E. 446, this

Court said: "*In Murdock v. City of Memphis*, 20 Wall. 590, 636, this Court announced as one of the propositions which flowed from the provisions of the second section of the act of February 5, 1867 (14 Stat. 386), embodied in section 709 of the Revised Statutes of 1874, and still in force, that even assuming that a Federal question was erroneously decided against the plaintiff in error, the court must further enquire whether there was any other matter or issue adjudged by the State Court which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question; and that if that is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision or such other matter in issue."

In *Jenkins v. Buthold Lowenthal, etc., Bank*, 110 U. S. 222, 28 L. Ed. 129, this Court, speaking through Chief Justice WAIT, said:

"Two defenses were interposed among others, one that the defendants who are the present owners of the property, are innocent purchasers for a valuable consideration without notice of any outstanding equities in the assignee or the bankrupt; and the other that the suit was not brought within two years after the alleged cause of action accrued to the assignee. R. S. sec. 5057. Either of these defenses, if sustained, bars the action. The second involves a Federal question; the other does not. The Court in its decree sustained them both and, among other things, found as a fact that the defendants were innocent purchasers for value. As

the finding is broad enough to maintain the decree, even though the Federal question involved in the other defense was decided wrong, we affirm the decree without considering that question or expressing any opinion upon it. *Murdoch v. Memphis*, 20 Wall. 590, sustains this practice."

In *Dower v. Richards*, 151 U. S. 658, 668, 38 L. E. 309, the Court said: "That this Court, in an action at law, at least, has no jurisdiction to review the decision of the highest court of a state upon a pure question of fact, although a Federal question would or would not be presented according to the way in which the question of fact was decided, is clearly settled by a series of later decisions, some of them in cases very like the one now before us."

In *Bement & Sons v. National Harrow Co.*, 186 U. S. 70, 46 L. E. 1065, this Court, citing *Dower v. Richards, supra*, said: "In this Court we are concluded by the findings of fact made in a state court in a suit in equity as well as in an action at law."

It will be noted that the testimony as to the delivery of the cotton was fully gone into in the trial Court. The issue tendered by the answer was fully met, and at the conclusion of the evidence both parties requested a direction for verdict. (Record, 91.)

The question of fact was thus squarely brought before the Court. The Court resolved it in favor of the Bank, and the Supreme Court affirmed the verdict.

If it were permissible for this Court to review the find-

ings of the State Court it would be found that they are fully sustained by the evidence. No other conclusion could have been reached. But as we have seen, this court is precluded from any such investigation, and it would be improper for us to enter into a discussion of the testimony.

Respectfully,

JOHN FLETCHER,

for Defendant in Error.

W. C. RATCLIFFE,

MOORE SMITH & MOORE,

SMEAD & POWELL,

of Counsel.

IN THE

Supreme Court of the United States

THE ARKANSAS SOUTHERN RAILROAD COMPANY AND GEORGE C. GRIFFITH.....
..... *Plaintiffs in Error*

v. No. 326.

THE GERMAN NATIONAL BANK.....
..... *Defendant in Error*

BRIEF FOR GERMAN NATIONAL BANK, ON MOTION TO DISMISS, IN REPLY.

Learned counsel for the plaintiff in error is mistaken in assuming that the validity of the paragraph which he quotes from the bills of lading was called in question in the State Court, and that "the Supreme Court of the State affirmed the judgment on the ground that delivery had not been made by the railway company as required by statute."

It is true that in the first amendent to the answer this paragraph of the bills of lading was referred to and the railroad company—as in its original answer—alleged that it had delivered the cotton to the compress company *"as agent for the holder of the bills of lading."* On this, issue

was joined and aside from the question of *bona fides* weights and values, of cotton, but little other testimony was taken than upon this issue. The testimony of Hutchingson, the agent of the railroad, was introduced by the railroad company, (Record pp. 60-79) and the testimony of Wright, the manager of the compress company (Record pp. 79-83) was introduced by the bank. The testimony of both was almost entirely with reference to the question as to how the cotton was delivered to the compress company—whether to the account of the holder of the bills of lading or to the account of Alphin-Lake Cotton Company. There was no material conflict in this evidence. It unmistakably showed that the cotton, instead of being held for twenty-four hours as required by the bills of lading, was delivered to the compress at once for account of Alphin-Lake Cotton Company. No account was kept of it by the railroad company. No instructions were given to the compress company. Alphin-Lake Cotton Company shipped in all the cotton over the road. It was understood by both Hutchingson and Wright at the time of delivery that the cotton was for account of the Alphin-Lake Cotton Company, and went to their account. It was further shown that Alphin-Lake Cotton Company procured bills of lading from the St. Louis, Iron Mountain & Southern Railway Company for all the cotton in the compress to be shipped out, and often had bills of lading from that company for more cotton than was in the compress. That Hutchingson, who was also the agent for the St. Louis, Iron Mountain & Southern Rail-

way Company, knew this, and tried to keep count of the cotton in the compress, all of which was claimed by Alphin-Lake Cotton Company, and was so understood to be by Hutchingson. He did this in the interest of the St. Louis, Iron Mountain & Southern Railway. The findings of the Court, which are assigned as error by the plaintiff in error, were based upon this testimony and are fully sustained by it.

Nowhere does the Court in its opinion call in question the validity of any part of the bills of lading. On the contrary the opinion of the Court (Record pp. 102-3) construes the paragraph in the bills of lading quoted by counsel to mean just what it says; that is to say, by it the railway company's liability as carrier ceased after arrival of the cotton, and after that it was liable as a warehouseman. This is the clear meaning of the bill of lading. If there were nothing in the general principles of law which would make the railroad company liable, at least as a warehouseman, this paragraph would. It not only authorizes the railroad company to store the cotton but to sell it at the end of sixty days to pay charges. How could this be done if delivery to the compress was delivery to the holder of the bills of lading?

Hutchingson on Carriers, § 488.

The Court, after holding that under the terms of the common law and the contract, the carrier had the right to discharge itself from the liabilities as a carrier, had the right

to store the cotton and thereafter assume the liabilities of a warehouseman, takes up the statutes and holds that they are simply *"for the purpose of enforcing these duties and the protection of the parties in interest."*

It was contended that the words, "care of the compress," authorized the railroad company simply to deliver the cotton to the compress and be relieved from all further liability. This is disposed of by the opinion, (Record, p. 106), construing these words in connection with the words, "to the order of the shipper." The Court held that this contention would render the phrase, "shipper's order," meaningless. That "failure of the legal holder of the bills of lading to appear for the purpose of receiving the cotton, when it reached its destination, did not relieve appellant (plaintiff in error) from further responsibility. But under *the contract and the law* it had the right to store the cotton with the compress company with authority and direction to deliver it to the person entitled to it upon production of the bills of lading properly endorsed. *Under the contract, as shown by the bills of lading,* it was relieved of liability on account of the storage, but not of the failure to deliver according to law."

Instead of questioning the validity of any part of the bills of lading, the court simply construed them. Its construction is, we submit, clearly sound. But whether sound or not, it is not for this Court to determine. It is a non-federal question, and, like the finding of facts, this Court

will not enquire into them. They are broad enough to sustain the judgment in this case without regard to the statutes. *Pennsylvania R. R. Co. v. Hughes*, 91 U. S. 477; *Allen v. Alleghany Co.* 196 U. S. 458.

The cases cited by counsel to support the proposition that the words, "care of the compress," made the compress company the agent of the holders of the bills of lading, do not sustain him. They did not arise upon shipper's order bills of lading and the facts were different from the facts in the case at bar.

It is said by counsel that "An assignment of errors can not be availed of to import error into a cause." This may be granted. But surely this Court will not hesitate to take the word of distinguished and learned counsel as to what the Court did decide. If the Court has any doubt as to this, we beg to assure the Court that learned counsel as to this is entirely correct. He is fully borne out by the opinion and by the record in the case.

We submit, however, that the Court will not permit him to change front in this way, even if he had been in error. But counsel says that neither is the motion for a rehearing to be relied upon any more than the assignment of errors. It is held by this Court that the motion for rehearing is part of the record of the State Court, and a federal question may be raised thereby.

Mallett v. North Carolina, 181 U. S., 45.

Leigh v. Green, 193 U. S., 79.

Learned counsel says that the decision was in no wise based upon its recital of facts. In this he not only contradicts the record made in the case as shown by the motion for rehearing but the declarations made in the assignment of errors, as well as the record of the evidence in the case. Besides, the opinion of the Court, as well as the dissenting opinion of Justice McCulloch, show otherwise.

Counsel points to the dissenting opinion of Justice McCulloch to show that the evidence was conflicting. The learned justice, in an opinion which is evidently hastily written, states (Record p. 108) that the opinion of the Court as he understands it, was based upon the theory that the agent of the railroad company was guilty of negligence in failing to notify the manager of the compress company of the fact that the cotton had been consigned to shipper's order. In this he was not accurate. The opinion of the Court, while finding that no instructions or information had been given to the compress company as to the nature of the consignment, finds also that the cotton was treated as the cotton of Alphin-Lake Company and delivered as such. Either of these findings, we submit, would be sufficient and render the railroad company liable. The learned justice then suggests that it was as much the duty of the holder of the bills of lading to notify the compress company to hold the cotton as it was for the railroad company. In this he shows that he has but little familiarity with the uses of bills of lading in commercial affairs. If the value of bills of lading as security depended upon notice to be given by every holder there-

of, few would be used in commercial transactions. No banker or other person could be assured that the previous holder had given such notice. The learned justice then says the negligence of the railroad company was not put in issue by the pleadings. In this he is again in error. As we have seen, the railroad company pleaded in defense, that it did not undertake to deliver the cotton to the order of the shipper, but that it undertook to deliver to the compress company as the *agent of the holder of the bill of lading, and that it did so deliver.* Issue was joined on this and the railroad undertook the burden of showing delivery, not merely to the compress company, but to that company *as agent of the holder of the bill of lading,* and the burden of the testimony of Hutchingson and Wright was directed to that issue. (Record, —A-83.) Now it cannot be said that such a defense is sustained by the railroad dumping at the compress company 950 bales of cotton without any information or directions whatever to guide the compress company, or by which it could tell to whom the cotton belonged. Nor is such defense sustained when it is shown that the cotton was all delivered as the property of and for Alphin-Lake Cotton Company and treated as such. In fact, to say that no directions or information was given the compress company to hold, as the agent of the holders of the bills of lading, is one step in proving that the cotton was delivered to the compress company as and for the account of Alphin-Lake Company. But the learned justice also overlooked the well established rule of practice in the courts of Arkan-

sas, that when an issue is made in the introduction of the evidence at the trial, the pleadings will be treated as if amended to conform to the evidence. That courts regard the substance rather than the form. The character of the action must be determined by the nature of the grievance rather than the form of the declaration.

Fordyce v. Nix, 58 Ark., 139.

Railway v. Triplett, 54 Ark., 304.

St. L., I. M. & S. Ry. v. Harper, 44 Ark., 527.

Railway v. Hammond, 58 Ark., 347.

Thompson v. Tucker, 5 Ark., 312.

Washington v. Love, 34 Ark., 93.

Nebraska Nat. Bk. v. Walch, 68 Ark., 433.

As we have seen, the testimony on this question of delivery was fully gone into at the trial and the evidence fully justifies the action of the Court. The learned justice was also mistaken as to the nature of the complaint.

> "Failure of a carrier to deliver goods on demand after storage, without lawful excuse, is a breach of the original contract, for which suit may be brought on contract."

Wilson v. Cal. Cent. R. R. Co., 29 Pac., 861.

The learned justice then makes the suggestion of conflict of evidence on the question of proper notice when delivery was made. And this suggestion is made alone upon

the supposition that Hutchingson testified that the letters S-O were upon the little book which was O. K.'d by Wright at the time of delivery. But Hutchingson does not say that these letters were on the book when Wright signed it. He says they seemed to be in different hand-writing; that the book was made up from the way-bills, but the way-bills have nothing indicating that the cotton was shipped on shipper's order. (Record pp. 75, 76, 77, 78, 79.)

But Wright is very clear that no such letters were on the book when he signed it, and that the cotton was treated as the cotton of Alphin-Lake Cotton Company and was delivered to their account. (Record pp. 79-83.)

There is no conflict between the two witnesses, and when analyzed properly the testimony of Hutchingson alone will show that he understood that the cotton belonged to Alphin-Lake Cotton Company, that he treated it as such; that he gave no instructions or information to the compress company by which they could understand that it was to be held for the owner of the bills of lading. He depended upon Alphin-Lake Company to produce the bills of lading, and that the letters S-O were written in the little book after it had been signed by Wright.

The fact that the trial Court directed a verdict for the plaintiff does not, we submit, strengthen the contention of counsel. The Supreme Court was on that account forced to review all the evidence and make its own finding, and that finding shows for itself. It was so plain and its effect so

evident that counsel for plaintiff in error thoroughly understood it when the motion for rehearing and the assignments of error were filed.

JOHN FLETCHER,

For Defendant in Error.

W. C. RATCLIFFE,

MOORE, SMITH & MOORE,

Of Counsel.